Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KENNETH T. HAYWARD and
WILLIAM B. KRAUSE, JR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether the Anti-Arson Act of 1982, Title 18 U.S.C. 844(h)(1) was misused by alleging cross burning, a non-destructive statement, as an act of arson?

2.

Whether the petitioner's rights under the First Amendment to the United States Constitution were violated?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 5, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at ____ F.2d ____ (7th Cir. Nos. 91-3253 and 91-3568) decided October 5, 1993. This opinion is reproduced in the appendix. The trial court number was 91 CR 25 before the United States District Court for the Northern District of Illinois, Eastern Division, the Honorable Nicholas J. Bua, Judge Presiding.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 5, 1993. No request for a rehearing or a hearing en banc was requested. The jurisdiction of this court is invoked pursuant to Title 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

First Amendment, United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Title 18 §844(h)(1) United States Code Annotated

Whoever (1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or (2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States, including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for five years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years. Notwithstanding any other provision of law, the court shall not place on probation or suspend any sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.

Title 42 §3631 United States Code Annotated

Whoever, whether or not acting under color of law, by force or threat of force wilfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—(a) any person because of his race, color, religion, sex or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings; or (b) any person because he is or has been or in order to intimidate such person or any other person or any class of persons from (1) participating, without discrimination on account of race, color, religion, sex or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section; or (2) affording another person or class of persons opportunity or protection so to participate; or (c) any citizen because he is or has been or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex or national origin, in any of the activities, services, organization or facilities described in subsection (a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate, shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

STATEMENT OF THE CASE

An indictment was returned by the United States grand jury to the United States District Court, Northern District of Illinois, Eastern Division charging both the petitioner Hayward and Krause with violation of federal statutes. The district court had original jurisdiction of the case pursuant to Title 18 §3231 United States Code Annotated.

The indictment charged Hayward and Krause in four counts with a violation of Title 18 U.S.C. 241 in Count I, a violation of Title 42 §3631(b) in Count II, a violation of Title 18 §2 U.S.C. in Count III, a violation of Title 18 §844(h)(1) in Count IV and a violation of Title 18 U.S.C. §924(c)(1) in Count V.

Hayward was acquitted of Count V of the indictment and convicted on Counts I, III and IV; he received a sentence of 18 months on Counts I and III to run concurrent with one another and a term of 60 months on Count IV to run consecutive to the terms on Counts I and III.

Krause was convicted on Counts I, III, IV and V and received 18 months on Counts I and III to run concurrently with one another and 60 months on each of Counts IV and V to run consecutive to each other and to the sentence on Counts I and III.

A series of two cross burnings took place in front of the Rayan home in Keeneyville, Illinois on the Labor Day weekend of 1989. The defendant Krause was allegedly part of both cross burnings while Hayward allegedly participated in one of the cross burnings. The crosses were placed approximately 125 feet from the home in question and no property, other than the cross itself, was in danger of being damaged. Although no blacks lived in the Rayan home, a black man had visited the home the day before

the cross burning and testified that he was "kind of upset" when he was told that a cross had been burned in front of the home.

Thomas Hagan testified for the government that Kenneth Hayward told him that there would be a cross burning on the Labor Day weekend of 1989 but he did not know where, when or who was involved. He said the cross was being built by Tom Miller, who was another witness for the prosecution. He admitted going to Hayward's home at 3:00 a.m. on Labor Day and seeing the police at Hayward's home. Hagan also admitted making numerous conflicting statements to the F.B.I. and to the defense investigator just three days prior to his trial in which he contradicted himself in many particulars. He also admitted to having a cocaine problem and admitted to being threatened by the F.B.I. with possible prosecution in relation to that problem.

A DuPage County Deputy Sheriff responded to a call regarding the second cross burning on September 4, 1989 at 3:00 a.m. and went to the scene of the Rayan home on Webster Street in Keeneyville. He interviewed Mrs. Rayan and Mrs. Taxis, a neighbor who saw the cross burning and identified a black Ford pick up truck as being involved. He later stopped over at Ken Hayward's home which was a block and a half away and saw a group of males standing in the driveway and saw a Ford pick up truck which did not match the description of the Ford pick up truck he had received from Mrs. Taxis a few minutes before.

Bob Pauley testified that he lives next door to the Rayan's home and actually rents the home to the Rayans. He stated that he had a conversation with Ken Hayward, who is also his cousin, and Hayward warned him that he

had heard there was going to be some trouble in the neighborhood on Labor Day weekend of 1989. Pauley did see the first cross being ignited in the street in front of the Rayan home and he put out the fire. He indicated that the first cross was approximately 125 feet from the home and that no property was in danger. Pauley chased the people that had lit the cross in question and had an argument with a group at the end of said chase which included Tom Miller, Shelly Lawler, Will Krause and Steve Randall. The petitioner Ken Hayward was not present nor did Pauley see Ken Hayward anywhere near the burning or the group that he argued with. Pauley learned that a second cross was burned in front of the same home in the same location approximately four hours later in the early morning hours.

Steven Randall and Tom Miller testified that they built a cross in their yard on Sunday of the Labor Day weekend in 1989. Both Randall and Miller were key witnesses for the prosecution. After building the cross, they had a conversation with William Krause and asked him to go along with the cross burning. Later on that same night, Miller and Randall testified that they, along with Krause, carried the cross and a large concrete block as a base to the Rayan home on Webster in Keeneyville where the cross was burned. They ran back to their home which was less than a block away and Bob Pauley ran after them and had an argument with them about the cross burning. Randall admitted on cross examination to giving numerous false statements to everyone, including government agents in relation to the occurrences of the Labor Day weekend. Randall was given a deal to plead to a misdemeanor and he admitted that Ken Hayward had nothing to do with the first cross burning.

Tom Miller, another government witness, testified that he allegedly had a conversation with William Krause relating to the building of a cross on the Labor Day weekend. He testified that he made an inflammatory solution out of gasoline and vaseline in order to burn the cross. He stated that he, Randall and Will Krause carried the cross to the Rayan home and set it afire on the street in front of the home. He testified that approximately four hours later he heard some hammering from the yard of Ken Hayward's home 500 to 600 yards away and subsequently Ken Hayward allegedly came to the Miller house and yelled for Miller and Krause to come out and join him at his truck. After allegedly acquiring diesel fuel, they went to the Rayan home and placed the cross on the street in front of the driveway and after several attempts got the cross to burn. He admitted that he had made a deal with the government to plead to a misdemeanor in consideration of his testimony.

Miller first denied on cross examination, then admitted, that shortly after the cross burnings he went to Ed Hayward's home to a party dressed as Buckwheat with a black face and noose around his neck which was held by Randall who was dressed as a Ku Klux Klan member with peaked hat, mask and covered with a white sheet. He admitted to lying on numerous occasions about the cross burning.

Miller testified that the entire transaction relating to the burning of the crosses was a practical joke.

Miss Lynn Bardeleben testified against the defendant Krause and stated that Krause had threatened her at the time of a romantic break up between her and Will Krause. The event took place 1½ years after the cross burnings and Hayward had no connection with it at all. She said that Krause took the bullets out of a hand gun and put

it to her head and pulled the trigger approximately five times. She admitted that she did not call the police or say anything about Will Krause threatening her. She also admitted that Krause said nothing about the cross burning, the pending court case or the F.B.I. investigating the cross burning at the time of or before the gun incident. She also admitted that she told the defense investigators that the gun had nothing to do with the F.B.I. or a threat against testifying in court. She said that Krause was drunk and that the gun incident was blown out of proportion.

REASONS FOR GRANTING THE WRIT

The decision of the Seventh Circuit Court of Appeals in this case is in direct conflict with the decision of the Eighth Circuit Court of Appeals in the case of *United States v. Bruce Roy Lee*, 935 F.2d 952 (8th Cir. 1991). The court in *Lee* held specifically, in a case whose facts are far more aggravated than the case at bar, that Title 18 U.S.C. §844(h)(1) was totally inapplicable to non-destructive cross burning cases. The Eighth Circuit subsequently granted a hearing en banc for issues in the case except the issue relating to the applicability of Title 18 U.S.C. §844(h)(1) to anything but major arson cases. That issue was not disturbed and is the law in that circuit. The court is confronted with a major issue involving the rights of defendants who will be punished, for making mere statements and not endangering life and property, to draconian sentences. A minimum of five years consecutive time was never meant to be the measure by Congress in cases involving mere expressions of unpopular positions. This court, based upon this fundamental conflict should accept this case for determination of a very troubling issue. See *United States v. Behrens*, 375 U.S. 162 (1963); *Downum*

v. United States, 372 U.S. 734 (1963); *Jackson v. Taylor*, 353 U.S. 569 (1957); *Affronti v. United States*, 350 U.S. 79 (1955); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973).

The petitioner challenged, in his motion to dismiss, motion for a directed verdict, and motion for a judgment of acquittal notwithstanding the verdict, the wrongful application of Title 18 U.S.C. §844(h)(1) to the facts in the case at bar. Congress had made it abundantly clear when they passed the statute that it was an arson statute being amended to accommodate more forthright an understandable investigation. For years the statute punished offenses where an arson was committed by a defendant by use of explosives. Federal investigators could not, in most instances, determine whether the offense was in fact perpetrated by the use of explosives or an accelerant, such as gasoline, which would produce fire and completely destroy the property and many times cause loss of life.

In order to appropriately facilitate the object of the statute and to allow for reasonable investigation and prosecution of major arson cases, Congress in its wisdom amended the statute in 1982 to include the addition of "*fire*" as well as explosives in the commission of a federal felony. Title 18 §844(h)(1) provides:

> Whoever—uses fire or an explosive to commit any felony which may be prosecuted in the court of the United States . . . shall in addition to the punishment provided for such felony, be sentenced to imprisonment for five years . . .

It is the function of the courts to appropriately determine the intent of Congress in relation to the interpretation of statutes. This court stated in *United States et al. v. American Truckers Associations Inc.*, 310 U.S. 534 (1940):

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give affect to the intent of Congress.

It can be readily seen that Congress did not mean to apply this arson statute to those instances where fire was used as a means of expression such as in cross, flag, book burning or for merely an illumination source utilized by a defendant in the commission of another federal felony where absolutely no destruction of property or loss of live is intended or takes place. The Committee comments are very instructive in identifying the intent of the lawmakers in this regard. The Committee stated as follows:

> Under current law, arson-type offenses may be investigated and prosecuted by federal officials only when the damage or destruction to the burnt property was caused by means of an explosive. H.R. 6454 amends 844 e, f, h and i to provide that, where federal jurisdiction otherwise exists, damage or destruction (to the burnt property) caused by fire may also be the subject of a federal prosecution. Jurisdictional circumstances enumerated in these subsections of 844 otherwise remain unchanged. H.R. 97-678; page 2631.

The comments show clearly the intent of Congress to retain the statute as an arson statute. The Committee, in defining the purpose of the amendment, clearly stated their mission:

> Identifying fires caused by explosives is technically difficult. Determining the cause of a deliberately set fire involves extensive physical and chemical inventory of the debris at the fire scene, and extensive chemical laboratory analysis of the debris. Determining the persons responsible for causing the fire involved laborious analysis of insurance policy applications, records of property transfers, extensive corporate ownership records, balance sheets, profit and loss statement in comparison with information concerning other

> suspicious fires. Anti-Arson Act of 1982, House Report 97-678, page 2632.

The Committee's designation of the legislation as the Anti-Arson Act of 1982 gives perfect clarity to the purpose of Congress. The Committee went on to state:

> The current requirement that the damage be caused by means of an explosive results in the allocation of a great deal of investigative resources to proving that fact, even though it has been established that the fire was intentionally set, and the criminal parties may be known. At a hearing on this legislation, a representative of the Department of Treasury estimated that perhaps 30% of the significant arson investigations conducted by B.A.T.F. have to be discontinued because it appears that proof that the arson was caused by means of an explosive would be too difficult. A frequent method of burning buildings is by the use of gasoline or other flammable liquids. Several courts have held that gasoline mixed with air is a mechanical mixture that contains any oxidizing and combustible units in such proportions that ignition by fire might cause an explosion. Several courts, including the Court of Appeals for the Ninth Circuit, however, have rejected that theory. Anti-Arson Act of 1982, House Report 97-678, page 2632.

The Anti-Arson bill sponsor Senator John Glenn in explaining the ramifications of the amended Act stated to the Senate:

> This legislation would enhance the effectiveness of the federal investigations and prosecutions of arson by eliminating the necessity of proving that substances such as gasoline, were in an explosive state at the time that an arson was committed. Under the current law, satisfying this element of proof is quite often an onerous task requiring considerable time and effort. This legislation would also close a loop hole in the law which allows arsonists in certain jurisdic-

tions to escape federal prosecution and conviction. Citing, *United States v. Fiore*, 821 F.2d 127 (2nd Cir. 1987).

To bypass the Committee comments in determining the intent of Congress is to walk away from the express purpose of the legislators in passing the bill. The courts have held that where the literal language of the statute is contradicted by the legislative history as expressed by Congress, the legislative history and the expression of Congress should be controlling. See *Harrison v. Northern Trust*, 317 U.S. 476 (1943).

In *Foulkes v. C.I.R.*, 637 F.2d 1105 (7th Cir. 1981), the court reached directly to the intent of Congress in interpreting a statute as the literal language would totally abandon the intent of Congress. In *Bifulco v. United States*, 447 U.S. 381 (1980), this court exhaustively discussed judicial interpretation of statutes. The court recognized the plain-meaning doctrine of language in a statute but indicated that the courts have a responsibility to reach the intent of Congress in interpreting statutes. The court found that it was the policy of the Supreme Court to invoke the "rule of lenity" to interpret statutes that apply to substantive criminal law or to the penalties those statutes impose. See *United States v. Batchhelder*, 442 U.S. 114, 121 (1979); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978); *Ledner v. United States*, 358 U.S. 169, 178 (1958).

In *United States v. Bruce Lee*, 935 F.2d 952 (8th Cir. 1991), the case upon which the appellant seeks review by this court because of conflict between the Eighth Circuit and the Seventh Circuit the court clearly discussed the issue in relation to the interpretation of Title 18 U.S.C. 844(h)(1). In that discussion the court relied upon the same Committee comments that the appellant in the case before

this court relies upon to determine the intent of Congress. Are we to turn our back on the expressed statements of Congress to foster a meaning of the statute which is unfair, draconian, and contrary to law.

It is the petitioner's position that his rights under the First Amendment to the United States Constitution were violated.

Cross burning in the instant case was symbolic speech protected by the First Amendment. Accordingly under strict scrutiny the government failed to demonstrate a compelling interest to regulate the petitioner's speech. This frailty reaches Title 844(h)(1) because of the wrongful application of said arson statute to First Amendment considerations as well as Title 42 U.S.C. §3631(b) which was not narrowly tailored nor administered in this case to achieve the government's interest.

Unquestionably, the alleged conduct of both petitioners was symbolic speech protected by the First Amendment whether considered on the basis of the overbroad use of the arson statute Title 18 U.S.C. §844(h)(1) or the misapplication of Title 42 U.S.C. §3631(b).

In *Tinker v. Des Moines Independent Com. Sch. Dist.*, 393 U.S. 503, 512 (1969), the court stated:

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact.

Free speech protects the spoken word but does not end with the spoken statement. Its protection continues on in relation to symbolic speech. See *Texas v. Johnson*, 491 U.S. 397 (1989). Conduct may be sufficiently imbued with elements of speech and statement as to fall within the scope of the First and Fourteenth Amendments. Clearly, cross burning is imbued with First Amendment qualities, as it is a statement.

It is axiomatic that the First Amendment stands for the protection of the individual's right to speak and make statements regarding subjects that are not universally upheld nor attractive to members of government or many of our institutions. As the court said in *Texas v. Johnson*, 491 U.S. at 416-17:

> The court has never held that the government may ensure that a symbol be used to express only one view of that symbol.

The court held in *Tinker*, 393 US. at 505, that arm bands are a classic type of speech protected by the First Amendment. In *Collin v. Smith*, 578 F.2d 1197 at 1202 (7th Cir. 1978), the court found that the Village of Skokie was in violation of the First Amendment by taking action against the appellee's views and symbols.

Applying the reasoning of the above cases to Hayward and Krause, the cross burning was unquestionably symbolic speech that conveyed a particularized message that could be understood by those who saw it. Clearly the cross burning was symbolic speech therefore protected by the First Amendment.

Title 42 U.S.C. §3631(b) is unquestionably an example on content-based regulation of symbolic speech therefore presumably invalid and in direct conflict with this court's ruling under *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. ____ (No. 90-7675 June 22, 1992). The defendants in the above-stated cause of action were clearly prosecuted for the communicative content of a cross burning and not for any basis that was independent of the specific communication. The government cannot curtail expression merely because of its expression, its ideas, or its subject matter. See *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972).

In *R.A.V.*, this court addressed a cross burning case curiously similar to the case at bar. *R.A.V.*, of course, was more aggravated in that the cross was placed in front of a black family's home. In the case at bar, it is unrebutted that no blacks lived at the home in question and none were present in the home at the time of the two cross burnings. The only introduction of race into the factual mix was brought about by the testimony of a black person who was told about the cross burning a day after it took place and was "kind of upset". It should also be remembered that the only testimony as to the motivation in relation to the burning came from the government's witness Miller who testified that the entire thing was a practical joke.

As in *R.A.V.*, the statute in the instant case prohibits bias, motivated hatred and messages based on racial supremacy; applying the court's analysis from *R.A.V.*, Title 42 U.S.C. §3631(b) is content based and facially unconstitutional.

The court in *Texas v. Johnson*, 491 U.S. 397, 413 stated the principle upon which the First Amendment prevails.

> If there is a bedrock principle underlining the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

It has always been the mission of free speech under our Constitution to encourage, invite and solicit dispute. Many of the finest ideas, and ultimate courses of conduct, have evolved out of rigorous and heated disputes.

There was absolutely no credible evidence admitted at the trial showing that the conduct of the petitioners, if true, would create a clear and present danger to anyone. The nonsense of the petitioner Hayward having fired a pistol at the second cross burning was quickly dispatched

by the jury for what it was. The only evidence adduced at the time of trial was that the petitioners, the alleged practical jokers, immediately fled the area after each of the cross burnings.

In *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), the court discussed a fact structure which was far more inflammatory than we find in the present case. The appellant was a leader of a Ku Klux Klan group and spoke at a rally where hooded figures were carrying firearms and a large cross was burned. The epitaphs related at the rally included:

> This is what we're going to do to the niggers.

The court in that case held that the First Amendment protected the appellants cross burning.

There was no captive audience or intrusion into the privacy of a home in the instant case. Just as the court found in *Collin v. Smith*, 578 F.2d 1197, 1206 (1978), the court held that the government may undertake steps to protect targeted listeners from offensive speech only when the speaker intrudes on the privacy of the home or on a captive audience who cannot practically avoid the exposure. We certainly did not have that in the case at bar. Again, there were no blacks in the home, no one in the home was alerted to look at the crosses (one burned at about 11:00 p.m., the other at approximately 3:00 a.m.), the burnings took place approximately 125 feet from the home at the street.

Title 42 U.S.C. §3631(b) is unconstitutional on its face in that it was not narrowly drawn to achieve the government's interest. Any law that regulates speech is overbroad if it includes within its ambit a substantial amount of protected speech along with the speech that it may regulate. Citing *Houston v. Hill*, 482 U.S. 451, 458-460 (1985).

Therefore the cross burning in the instant case was symbolic speech protected by the First Amendment and the government failed to demonstrate a compelling interest to regulate the petitioner's speech.

Furthermore, Title 42 U.S.C. §3631(b) is a content-based regulation that was not neatly tailored to achieve the government's interest. The government therefore failed to meet any of the exceptions to regulate the cross burning and clearly violated the petitioner's constitutional rights under the First Amendment.

CONCLUSION

For all of the above-stated reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 91-3253 and 91-3568

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENNETH T. HAYWARD, and
WILLIAM B. KRAUSE, JR.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 CR 25—**Nicholas J. Bua,** *Judge.*

ARGUED JANUARY 8, 1993—DECIDED OCTOBER 5, 1993

Before FLAUM and MANION, *Circuit Judges*, and MILLER, JR., *District Judge.**

MANION, *Circuit Judge.* The United States of America ("government") charged Kenneth T. Hayward and William B. Krause ("defendants") with various crimes associated with the burning of two crosses on the property of a white family who had entertained black people in their home. The defendants were tried and convicted. On appeal, they challenge the district court's application of 18

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* Honorable Robert L. Miller, Jr., District Judge for the Northern District of Indiana, is sitting by designation.

U.S.C. § 844(h)(1) (use of fire or an explosive to commit a felony) and 42 U.S.C. § 3631(b) (interference with housing rights by force or threat of force) to this case. They also challenge the court's limitation of their cross-examination of certain witnesses and the court's denial of their motion to dismiss the indictment on the basis of prosecutorial misconduct. We affirm the district court in all respects.

I. Background

The events of this case occurred over the 1989 Labor Day weekend in Keeneyville, Illinois, a semirural, apparently close-knit and all-white community west of Chicago. Bob and Mary Jones, a white couple, rented a house in Keeneyville that they shared with their daughter, Pam, and son-in-law, Jad Rayan, both of whom are white. The Rayans had black friends who occasionally visited the house. Some of those friends visited the Rayans over the Labor Day weekend. During that holiday visit, the defendants burned crosses in front of the Joneses' house to underscore their dislike of blacks—or as they referred to them, "niggers" and "coons"—being in Keeneyville and staying with a white family.

Two crosses were burned that weekend. Krause, without Hayward (although Hayward knew about it) burned the first cross with the assistance of Thomas Miller and Steven Randall.[1] Early Sunday afternoon, Krause made the cross out of two pieces of two-by-four inch lumber, and Miller covered it with a flammable mixture he had made out of gasoline and petroleum jelly. The cross stood six and one-half feet high and was four and one-half feet wide. About 8:00 that evening, Krause, Miller, and Randall (all of whom had been drinking) carried the cross and a cement cinder block to the Joneses' house. They placed the cinder block at the edge of the Joneses' driveway and

[1] Miller and Randall later cooperated with the government in exchange for being charged with misdemeanors, rather than with felonies, for their roles in the cross burnings.

inserted the cross into the block. Krause attempted to light the cross, but could not because the gasoline had evaporated. He then ran back to the Randall house, where he was staying, got some gasoline, and returned. The men moved the cross a few feet up the driveway and doused it with the gasoline. Krause set the cross on fire and the men fled. A neighbor saw the burning cross and kicked it down.

Afterwards at the Randall house, Miller heard the sounds of a power saw and hammering coming from the direction of Hayward's house. Hayward, who was drunk, later arrived at the Randall house in his pickup truck. In the bed of the truck was a cross, larger than the first, approximately seven feet high, five feet wide, and built with two-by-six inch pieces of lumber. Hayward, Miller, and Krause removed the cross from the truck and drove to a nearby gasoline station to purchase diesel fuel to pour on the cross. Around midnight that same evening, the three men loaded the diesel-fuel soaked cross into the truck and drove to the Joneses' house, where they placed the cross into the same cinder block that held the first cross. Hayward lighted the cross, and the three men got into the truck and sped away.[2] While the cross burned in the driveway, a neighbor woke Pam Rayan. Rayan and her children saw the cross and were frightened. The neighbor telephoned the fire department because the burning cross threatened to set fire to a nearby tree. The police were also called.

The police investigation into who had burned the crosses made little progress. Most of those who knew about the crime, or were involved in it, were either related or good friends and refused to inculpate the defendants or themselves for that matter. A break occurred for the police more than a year later when Lynn Bardeleben, Krause's

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[2] Miller testified that as they drove away Hayward fired a small caliber handgun five or six times at the house. The jury acquitted Hayward of this act.

girlfriend, had an argument with Krause and subsequently told the police what she knew about the cross burnings. During the argument, Krause, who was drunk, hit Bardeleben and placed his .357 magnum handgun to her head. Unbeknownst to Bardeleben, the gun was unloaded. Krause pulled the trigger six times. He then cautioned her that she would be dead if she told the Federal Bureau of Investigation ("FBI") what she knew about the cross burnings. Bardeleben drove away from the apartment, but Krause followed her. When she arrived at a nearby police station, Krause blocked her egress from her car. Bardeleben began honking her car horn and Krause drove off.

Thereafter, the investigation into the cross burnings brought positive results for the government. An indictment was filed against the defendants, charging them each with conspiracy against civil rights, 18 U.S.C. § 241, use of fire to commit a federal felony, 18 U.S.C. § 844(h)(1), interference with housing rights by force or threat of force, 42 U.S.C. § 3631(b), aiding and abetting, 18 U.S.C. § 2, and use of a firearm to commit a violent crime, 18 U.S.C. § 924(c)(1). In addition, Krause was charged with threatening a witness (Bardeleben) in violation of 18 U.S.C. § 1512(b)(1). After a nine-day jury trial, Krause was convicted as charged. Hayward was convicted on all counts, except for the firearm charge. The defendants moved the district court for a judgment of acquittal notwithstanding the verdict or, in the alternative, for a new trial. They also moved the court to dismiss the indictment on the ground of prosecutorial misconduct. The court denied their motions. The court sentenced Krause and Hayward respectively to 153 months and 78 months in prison. This timely appeal followed.

II. Analysis

The defendants raise four points on appeal. First, whether the district court misapplied to this cross burning case 18 U.S.C. § 844(h)(1), which punishes the use of fire or an explosive to commit any federal felony. Second, whether

the district court's application of 42 U.S.C. § 3631(b) to this case violated the defendants' First Amendment right to burn the crosses as a matter of free speech. Third, whether the district court abused its discretion in limiting the defendants' cross-examination of certain witnesses. Fourth, whether the district court erred in denying the defendants' post-trial motion to dismiss the indictment on the basis of prosecutorial misconduct.

A. 18 U.S.C. § 844(h)(1)

In their first point on appeal, the defendants contend the district court erred in applying 18 U.S.C. § 844(h)(1) to this cross burning case. Section 844(h)(1) states: "Whoever . . . uses *fire* or an explosive *to commit any felony* which may be prosecuted in a court of the United States . . . shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for five years [to run consecutively to the punishment received for the predicate felony]." 18 U.S.C. § 844(h)(1) (emphasis added). In this case, the predicate felony was 18 U.S.C. § 241, conspiracy to violate another's civil rights.[3]

The defendants maintain that section 844(h)(1) does not apply to this case because Congress intended the statute only for the prosecution of arson cases. Although the defendants acknowledge that the plain wording of the statute could apply here, they insist that we should construe

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[3] Section 241 states in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . .
>
> . . . .
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 241.

the language to give effect to the intent of Congress. To accomplish this bypass of the plain meaning of the statute, the defendants urge us to look solely at the legislative history, which they claim focuses only on arson-type offenses.[4] We decline, however, to invert the process of statutory analysis, and we instead look to the wording of the statute itself to discern Congress's purpose in promulgating section 844(h)(1).

A court's starting point to determine the intent of Congress is the language of the statute itself, *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1326 (7th Cir. 1990), because the best method of discerning congressional intent is to examine the words Congress used in the statute. *See Meredith v. Bowen*, 833 F.2d 650, 654 (7th Cir. 1987). "Where a word or a phrase has not been otherwise defined in a statute [as is the case in section 844(h)(1) with the word "fire"], a court should give it its plain and ordinary meaning." *Bailey v. City of Lawrence*, 972 F.2d 1447, 1451 (7th Cir. 1992).

A court looks past "the express language of a statute only where that statutory language is ambiguous or where a literal interpretation would lead to an absurd result or thwart the purpose of the overall statutory scheme." *United States v. 916 Douglas Ave.*, 903 F.2d 490, 492 (7th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991). In contrast, when the language of a statute is clear and unambiguous, no need exists for the court to examine the legislative history, and the court must give effect to the plain meaning of the statute. *E.g.*, *Bethlehem Steel Corp.*, 918 F.2d at 1326; *NuPulse, Inc. v. Schlueter Co.*, 853 F.2d 545, 548 (7th Cir. 1988); *Meredith*, 833 F.2d at 654. Along with looking at the language of the statute section in question,

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[4] The legislative history the defendants rely on appears at 128 Cong. Rec. 18814-17, 24608-10 (1982) and House Report No. 678, 97th Cong., 2d Sess. 1-5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2631-35. *See also United States v. Fiore*, 821 F.2d 127, 131-32 (2d Cir. 1987) (reproducing the relevant legislative history).

part of a court's analysis includes examining the language and design of the statute as a whole. *E.g., K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

1. Examination of Section 844(h)(1).

Our reading of section 844(h)(1) leads us to conclude that the intent of Congress is clearly expressed in the language of the statute. Section 844(h)(1) states in simple, clear terms that "[w]hoever . . . uses *fire* or an explosive *to commit any felony* which may be prosecuted in a court of the United States . . . shall . . . be sentenced to imprisonment for five years. . . ." 18 U.S.C. § 844(h)(1) (emphasis added). The language of the statute does not limit itself to the prosecution of arson cases, as the defendants urge us to conclude. Had Congress wanted to so limit the statute, it could have easily inserted the word "arson" into the statute. *See Smith v. United States*, 113 S.Ct. 2050, 2054 (1993). For example, Congress could have drafted the statute to read: Whoever uses fire or an explosive to commit *any arson* which may be prosecuted in a court of the United States shall be sentenced to imprisonment for five years. Congress chose not to do so. Instead, Congress chose to punish those who use *fire to commit any felony*. That dictate applies to the facts of this case. The defendants used fire to burn two crosses in order to commit the felony of violating the civil rights of the inhabitants of the house. 18 U.S.C. § 241. Accordingly, we find the language of section 844(h)(1) to be clear and unambiguous and the statute applicable to the facts of this case. *Cf. United States v. Worthy*, 915 F.2d 1514, 1516-17 (11th Cir. 1990) (holding that pre-1990 Sentencing Guidelines section 2K1.4(b)(4)—use of fire or explosives to commit a federal felony—is not restricted to arson crimes and applies to cross burnings designed to interfere with another's civil rights); *accord United States v. Gresser*, 935 F.2d 96, 102-03 (6th Cir.), *cert. denied*, 112 S.Ct. 239 (1991).

The defendants insist, however, that the application of section 844(h)(1) to this case causes an absurd result.[5] For that characterization to apply, the application here would have to be so outlandish that Congress could not have intended it. This statute does not reach that difficult standard. Put another way, "[a] straightforward reading of [section 844(h)(1)] does not produce a result so absurd or glaringly unjust as to raise a reasonable doubt about Congress's intent." *Chapman v. United States*, 111 S.Ct. 1919, 1926-27 (1991) (citations and internal quotation marks omitted). The language Congress used in section 844(h)(1) shows that Congress intended to punish those who use *fire to commit any felony*. That is exactly what the defendants did in this case. Hence, the application of the statute here does not cause an absurd result.[6]

To underscore their point that to avoid an absurd result section 844(h)(1) must apply only to arson cases, the defendants provide us with the example of a person who commits the theft of an interstate shipment. They posit that if the thief uses a "Bic" lighter as a light source to help him insert the key into the lock of the truck he wants to steal, section 844(h)(1) could be applied, thus causing

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[5] We note that in cases dealing with a cross burning in front of a person's house, such as occurred here, the government's common practice is to charge the defendant under § 844(h)(1) as well as under 18 U.S.C. § 241 and 42 U.S.C. § 3631, as it did in this case. *E.g.*, *United States v. Gresser*, 935 F.2d 96, 98 (6th Cir.), *cert. denied*, 112 S.Ct. 239 (1991); *United States v. Long*, 935 F.2d 1207, 1209 (11th Cir. 1991); *United States v. Skillman*, 922 F.2d 1370, 1371 (9th Cir. 1990), *cert. dismissed*, 112 S.Ct. 353 (1991); *United States v. Salyer*, 893 F.2d 113, 114 (6th Cir. 1989); *Munger v. United States*, No. 92-CV-553, 1992 WL 511995, at *1 (N.D. N.Y. Nov. 27, 1992).

[6] Indeed, although one could argue that the application of the five-year mandatory penalty of § 844(h)(1) to the defendants' crime is stern, "[t]he remedy for any dissatisfaction with the results in [this case] lies with Congress and not with this Court. Congress may amend the statute; we may not." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982).

an absurd result. But there is a significant difference between using fire simply to *commit* a felony and using fire to *facilitate* or *assist* in the commission of a felony. Fire from the "Bic" lighter facilitates or assists in the commission of the crime of interstate theft. That is not the same as using fire to commit a felony, in this case conspiracy against rights through threat or intimidation. Using the lighter to illuminate a keyhole is no different from illuminating the keyhole with a flashlight. Illuminating a wooden cross, however, with a flashlight or a floodlight is completely different from illuminating the cross by setting it on fire. The fire is an integral part of the threat or intimidation. One cannot reasonably argue that merely erecting a wooden cross, whether illuminated by a floodlight or not, on someone's driveway has the same effect as setting the cross on fire. The intimidation or threat does not stem from the fact that a wooden cross—by itself—is placed outside one's home. The intimidation stems from the flames emanating from the cross. By burning two crosses, the defendants *used fire to commit* the felony of conspiracy to violate the civil rights of those in the Jones household. The fire did not simply *facilitate* or *assist* them in the commission of their crime.[7]

Moreover, an examination of the language and design of section 844 supports our conclusion that section 844(h)(1)

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[7] No doubt, a reasonable argument could be made that had Congress intended § 844(h)(1) to apply to the example the defendants' offer, Congress would have inserted language into the statute to prohibit the use of fire, not only to commit a felony, but *to facilitate the commission* of a felony. *Cf.* 21 U.S.C. § 881(a)(7) (real property forfeiture). In the same vein, Congress, if it so chose, could have proscribed the use of fire *during* the commission of a felony by inserting the appropriate language into § 844(h)(1). *Cf.* 18 U.S.C. § 844(h)(2) (prohibiting the carrying of an explosive during the commission of any federal felony). We pass no judgment on whether the government could prosecute a person under § 844(h)(1) based on the very limited facts the defendants set forth in their interstate shipment theft hypothetical. The government has discretion in how it charges people alleged to have committed federal crimes.

is not restricted solely to arson cases. *See K Mart Corp.*, 486 U.S. at 291. Section 844 is a penalties statute fashioned to punish the illegal use of fire or explosives. In drafting the statute, Congress placed section 844(i), the federal arson statute, immediately after section 844(h). Section 844(i) provides in part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both. . . .

18 U.S.C. § 844(i). If Congress had intended section 844(h)(1) to apply only to arson cases, as the defendants maintain, then no need would exist for section 844(i) and vice versa. Surely Congress did not intend to duplicate section 844(h)(1) with section 844(i). Instead, section 844(h)(1) applies to anyone who uses *fire to commit any felony* and is not limited just to arson cases. *See Freytag v. C.I.R.*, 111 S.Ct. 2631, 2638 (1991) (noting that courts should have " 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment' "); *see also United States v. Roy*, 830 F.2d 628, 634 (7th Cir. 1987) (stating that in construing a legislative enactment, "we presume that the legislature intended that each section was a necessary component of the statutory scheme and not surplusage"), *cert. denied*, 484 U.S. 1068 (1988). *Compare United States v. Fiore*, 821 F.2d 127, 130-32 (2d Cir. 1987) (holding that sections 844(h)(1) and 844(i) are not multiplicitous) *with United States v. Chaney*, 559 F.2d 1094, 1096 (7th Cir. 1977) (holding that the pre-1982 amended version of section 844(h)(1) and section 844(i) cannot be charged in the same indictment when identical evidence is used to prove both); *see also United States v. Karlic*, 997 F.2d 564, 571 (9th Cir. 1993) (discussing *Fiore* and *Chaney*). As such, we conclude that the language and design of section 844 as a whole is consistent with the charge and conviction under the facts of this case.

2. Rule of Lenity.

The defendants further suggest that section 844(h)(1) is at least ambiguous and, thus, we should apply the rule of lenity and look past the language of the statute and to its legislative history. We disagree. The rule of lenity "is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of [a statute] such that even after a court has seize[d] every thing from which aid can be derived it is still left with an ambiguous statute." *Chapman*, 111 S.Ct. at 1926 (citations and internal quotation marks omitted). The language in section 844(h)(1) is clear and unambiguous. Therefore, we do not need to examine the legislative history of the statute. *916 Douglas Ave.*, 903 F.2d at 492; *see also, e.g., U.S.E.P.A. v. Environmental Waste Control, Inc.*, 917 F.2d 327, 332 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1621 (1991); *Continental Can Co. v. Chicago Truck Drivers*, 916 F.2d 1154, 1160 (7th Cir. 1990) (Flaum, J., concurring). To examine the legislative history in this case, and, thereby, apply the rule of lenity, would require us to contrive or manufacture some ambiguity, which is clearly inappropriate. *See Bifulco v. United States*, 447 U.S. 381, 387 (1980); *United States v. Marshall*, 908 F.2d 1312, 1318 (7th Cir. 1990) (en banc), *aff'd*, 111 S.Ct. 1919 (1991).

3. Eighth Circuit Caselaw.

The defendants rely chiefly on an Eighth Circuit case to support their position that section 844(h)(1) does not apply to this case. In *United States v. Lee*, 935 F.2d 952 (8th Cir. 1991), the court addressed the applicability of section 844(h)(1) to nondestructive cross burning cases and found the statute inapplicable. *Id.* at 958. In a one-paragraph analysis, the court looked first to the legislative history of section 844(h)(1) instead of to the language of the statute to discern congressional intent. Based on its reading of the legislative history, the court determined that section 844(h)(1) was meant to apply only to arson cases. *Id.*

Yet, as the district court in our case rightly observed, the *Lee* court's approach "puts the cart before the horse." *United States v. Hayward*, 772 F. Supp. 399, 402 (N.D. Ill. 1991). Rather than initially examining the statutory language to determine whether it was ambiguous, unclear, or would have led to an absurd result, the *Lee* court began with the legislative history of section 844(h)(1). Its reliance on the legislative history, in place of the plain and clear meaning of the statute, caused it to have to "guess" whether Congress intended section 844(h)(1) to apply to cross burning cases. *Lee*, 935 F.2d at 958. Such an approach runs counter to the traditional method of statutory construction: "The rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan v. United States*, 364 U.S. 587, 596 (1961). Consulting legislative history is intended to resolve ambiguities that arise from the language of a statute; it is not intended to create ambiguities. *See Bifulco*, 447 U.S. at 387; *Callanan*, 364 U.S. at 596. Thus, because the *Lee* court bypassed the clear and unambiguous language of section 844(h)(1), we reject its determination that section 844(h)(1) does not apply to cross burnings done to violate another's civil rights under 18 U.S.C. § 241.[8]

4. Conclusion.

We hold that section 844(h)(1) is clear and unambiguous. It provides a mandatory five-year prison term for anyone who has been convicted of using *fire* or an explosive *to commit any felony* and is not limited just to arson cases. Further, the application of section 844(h)(1) to cross burn-

[8] Because of the conflict with the Eighth Circuit's decision in *Lee*, we have circulated this opinion to the entire court pursuant to Seventh Circuit Rule 40(f). A majority of judges in active service voted not to rehear this case *en banc*. (Judge Cudahy voted to rehear this case *en banc*.)

ings designed to violate a person's civil rights is not absurd and does not frustrate the overall statutory scheme of section 844. No need, therefore, exists for us to examine the legislative history to determine Congress's intent. Congress's intent is clear from the words it chose to include in section 844(h)(1).[9] *See Central States v. Cullum Cos.*, 973 F.2d 1333, 1339 (7th Cir. 1992); *Trustees of Iron Workers Local 473 Pension Trust v. Allied Prods. Corp.*, 872 F.2d 208, 212-13 (7th Cir.), *cert. denied*, 493 U.S. 847 (1989).

B. 42 U.S.C. § 3631(b)

In their second point on appeal, the defendants argue that cross burning is protected speech. They contend that the government unconstitutionally regulated their speech by prosecuting them under 42 U.S.C. § 3631(b), which they describe as a "content-based regulation" that is not narrowly tailored to achieve any compelling governmental interest. Hence, they maintain that the district court erred in applying the statute to this case.

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[9] The defendants also argue for the first time on appeal that

> [t]he offense of 18 U.S.C. § 844(h)(1) requires the defendant to use fire in the commission of another federal felony. Since the federal felony of conspiracy, under 18 U.S.C. § 241, is complete at the time that the agreement is made, the use of fire in the case at bar gives no vitality to the commission of the conspiracy. The fire was not an aid in formulating the agreement.

The defendants have waived this argument because they did not present it to the district court. *E.g., Textile Banking Co. v. Rentschler*, 657 F.2d 844, 853 (7th Cir. 1981); *see also United States v. Hayward*, 764 F. Supp. 1305, 1306-08 (N.D. Ill. 1991) (denying the defendants' motion to dismiss). The defendants also contend that the imposition of the five-year mandatory penalty consecutive to the term of imprisonment for the predicate offense, § 241, is cruel and unusual punishment and disproportionate to the cross burnings. Because they do not develop this argument beyond that mere assertion, we decline to consider it. *See, e.g., United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir.), *cert. denied*, 112 S.Ct. 141 (1991).

Section 3631, which is part of the Fair Housing Act, 42 U.S.C. §§ 3601-3631, is a federal misdemeanor statute that states in part:

> Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—
>
> (a) any person because of his race, color, religion, sex, handicap . . ., familial status . . ., or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings; or
>
> *(b) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—*
>
> *(1) participating, without discrimination on account of race, color, religion, sex, handicap . . ., familial status . . ., or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section; or*
>
> *(2) affording another person or class of persons opportunity or protection so to participate . . . .*
>
> . . . .
>
> shall be fined not more than $1,000, or imprisoned not more than one year, or both. . . .

42 U.S.C. § 3631(a)-(b) (emphasis added).

1. Expressive Conduct.

In determining whether section 3631(b) violates the defendants' First Amendment rights, we must first deter-

mine whether this type of cross burning is expressive conduct, giving the defendants a claim to First Amendment protection against their conviction. *Texas v. Johnson*, 491 U.S. 397, 403 (1989). Although the United States Supreme Court has rejected "the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea," the Court has recognized "that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Id.* at 404 (citations and internal quotation marks omitted). "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we [ask] whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

In this case, the evidence showed that the defendants burned the crosses to tell those in the Jones household (and no doubt to anyone else who saw the burning crosses) that black people were unwelcome in Keeneyville and that association with blacks was not approved. Anyone who saw the burning crosses, especially those in the Jones household, was highly likely to understand their meaning. Indeed, a burning cross may provide different connotations to different people. Some would certainly view a burning cross as "a precursor to physical violence and abuse against African-Americans and . . . an unmistakable symbol of hatred and violence based on virulent notions of racial supremacy." Charles H. Jones, *Proscribing Hate: Distinctions Between Criminal Harm and Protected Expression*, 18 Wm. Mitchell L. Rev. 935, 948 (1992). Inevitably the cross burnings here involved some degree of expressive conduct, albeit not absolutely protected conduct. *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2541 & n.1, 2544, 2550 (1992) (stating that cross burning is expressive conduct that is not subject to total First Amendment protection and, therefore, may be punished under certain laws).

No doubt, the defendants wanted to *express* their dislike, even hatred, of blacks through the cross burnings. But the act of cross burning also promotes fear, intimidation, and psychological injury. Therein lies the reason cross burning, as done in this case, lacks First Amendment protection. *See id.* at 2544 ("Non-verbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses."). Cloaking an act that portends violence with the guise of protected expression is nothing more than claiming that the First Amendment protects fighting words. *Id.* at 2545 ("Fighting words are thus analogous to a noisy sound truck . . . both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment."). Accordingly, some forms of expression, in this case cross burning used to intimidate, are harmful and damaging to others and, as such, do not enjoy the protecting cover of speech in the constitutional sense.

2. Extent of Governmental Regulation.

Because the cross burnings involved expressive conduct, we need to consider whether the government's regulation of that conduct was related to the suppression of free expression. *Johnson*, 491 U.S. at 403. If so, we apply a heightened standard of review. *Id.* If not, we apply the less stringent test announced in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *Id.*

The purpose of section 3631(b) is to protect the right of an individual to associate freely in his home with anyone, regardless of race. To achieve that end, the statute prohibits acts of willful intimidation against people based on race. The statute, then, is aimed at curtailing wrongful conduct in the form of threats or intimidation, and not toward curtailing any particular form of speech. *See Wisconsin v. Mitchell*, 113 S.Ct. 2194, 2200-01 (1993). Consequently, because section 3631(b) is content-neutral, it does not directly regulate speech. As such, rather than a heightened standard of review, we employ the lesser standard enunciated in *O'Brien*:

> a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377. Under *O'Brien*, section 3631(b) qualifies as a sufficiently justified regulation.

Because section 3631(b) is part of the Fair Housing Act, its enactment was a proper exercise of the government's power under the Thirteenth Amendment to eradicate all incidents and badges of slavery.[10] *Williams v. Matthews Co.*, 499 F.2d 819, 825 (8th Cir.), *cert. denied*, 419 U.S. 1021, *and cert. denied*, 419 U.S. 1027 (1974); *see Norwood v. Harrison*, 413 U.S. 455, 470 & n.10 (1973). Also, section 3631(b) advances an important and substantial governmental interest by protecting a person's right to occupy a dwelling without fearing threats or intimidation based on race. We conclude that the statute is narrowly tailored to achieve that result. In this case, the statute did not proscribe cross burning as a form of expressive conduct. *Cf. R.A.V.*, 112 S.Ct. at 2541, 2547 (finding unconstitutional a statute that specifically proscribed cross burning, among other things); *Johnson*, 491 U.S. at 414 (noting that the "bedrock principle underlying the First Amendment . . . is that the Government may not prohibit the expres-

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[10] The Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1982), originated at Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, § 801 *et seq.*, 82 Stat. 81-89 (1968). The "Prevention of Intimidation" section was attached to the civil rights legislation as Title IX and incorporated into the Fair Housing Act as section 901, 82 Stat. 89 (1968). The text of section 901, as codified and amended [appears] at 42 U.S.C. § 3631. . . .

United States v. Gilbert, 813 F.2d 1523, 1526 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987).

sion of an idea simply because society finds the idea itself offensive or disagreeable"). Section 3631(b) prohibited the defendants' cross burnings because they willfully intended to threaten and intimidate those in the Jones household for entertaining black people in their home. *See United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir.) (explaining that the requirement in section 3631 "of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech"), *cert. denied*, 484 U.S. 860 (1987). The government's interest, then, in this case is unrelated to the suppression of free expression.

Finally, even though expressive speech may be involved in the proscribed conduct, that is insufficient to make section 3631(b) unconstitutional. As the Supreme Court stated in *R.A.V.*,

> since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices. *Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.*

R.A.V., 112 S.Ct. at 2546-47 (emphasis added) (citations omitted); *see also Gilbert*, 813 F.2d at 1529 ("An illegal course of conduct is not protected by the first amendment merely because the conduct was in part carried out by language in contrast to direct action. If conduct contains both speech and non-speech elements, and if Congress has the authority to regulate the non-speech conduct, incidental restrictions on freedom of speech are not constitution-

ally invalid.") (citations omitted). Accordingly, we determine that any incidental restrictions on the alleged First Amendment rights in this case are no greater than is necessary to further the government's valid interest of protecting the rights of those in the Jones household to associate freely with whomever they choose.

3. Conclusion.

We hold that section 3631(b) regulates the wrongful conduct of threats and intimidation based on race and is content neutral on its face. *See also Gilbert*, 813 F.2d at 1528-31 (ruling section 3631(b) constitutional); *Munger v. United States*, No. 92-CV-553, 1992 WL 511995, at *5-*6 (N.D. N.Y. Nov. 27, 1992) (same). The application, therefore, of section 3631(b) to this case did not violate the defendants' First Amendment rights.

C. Cross-Examination

In their third point on appeal, the defendants argue that the district court erred in curtailing the cross-examination of certain government witnesses. They maintain that the district court's actions prevented them from effectively impeaching those witnesses. "It is well-established that the Sixth Amendment only guarantees the defendant the opportunity for effective, not limitless, cross-examination." *United States v. Muhammad*, 928 F.2d 1461, 1466 (7th Cir. 1991).

> The right to an opportunity for effective cross-examination, however, does not give defense counsel license to conduct the cross-examination as [he] chooses. A trial judge has broad discretion to impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness . . . based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. Limitations on cross-examination do not interfere with

> the defendant's Sixth Amendment rights provided that cross-examination was sufficient to enable a jury to evaluate [the defendant's] theory of defense and to make a discriminating appraisal of the witness's motives and bias.

Id. at 1466-67 (citations and internal quotation marks omitted). "In order to determine whether the restrictions placed on the right to cross-examine a witness rise to the level of a constitutional deprivation, we 'look to the record as a whole . . . and to the alternative means open to impeach the witness.' " *United States v. Cameron*, 814 F.2d 403, 406 (7th Cir. 1987) (quoting *United States ex rel. Blackwell v. Franzen*, 688 F.2d 496, 500-01 (7th Cir. 1982), *cert. denied*, 460 U.S. 1072 (1983) (citations omitted)). "We must resolve whether the restrictions that the court imposed on the defendant's cross-examination deprived the defense of a meaningful opportunity to elicit available, relevant information that was likely to effectively impeach the credibility of the witness." *Id.*

1. Eviction Proceedings.

The defendants challenge the district court's grant of the government's motion *in limine*, precluding the defendants from cross-examining the occupants of the house about their pending eviction proceedings. The defendants assert that the testimony was necessary to show that the occupants left the house six months after the cross burnings because they were evicted and not because the cross burnings intimidated them to leave. The defendants maintain that the testimony regarding the eviction proceedings was relevant to show that the defendants burned the crosses, not out of racial animus, but to cause the "constructive eviction" of the tenants.

The district court did not abuse its discretion in finding the testimony regarding the eviction proceedings irrelevant. The fact that the tenants were later evicted from the house had nothing to do with the charges at hand. The main question in this case was whether the defen-

dants intended to intimidate the victims, not whether the victims were actually intimidated. 18 U.S.C. § 241; 42 U.S.C. § 3631(b). Evidence of the victims' state of mind would tell us little, if anything, about the defendants' state of mind in burning the crosses. Without doubt, the evidence at trial showed that the defendants burned the crosses to intimidate the tenants and to interfere with their right to associate freely in their home with people of another race. Both Hayward and Krause had stated before the cross burnings that they disliked the idea of black people (in their words, "niggers" and "coons") coming into Keeneyville. In particular, Robert Pauley testified that Hayward warned him about a "nigger" living in the house Pauley had rented to the Jones family. And, Steven Randall testified that Krause had invited him to participate in the first cross burning, because "there was a nigger living with a white bitch, and [Krause] didn't like the idea, in Keeneyville."

Consequently, because the government did not have to show that the tenants left the house as a result of the cross burnings, the testimony regarding their eviction proceedings was irrelevant to the charges the government brought against the defendants. The district court, therefore, did not abuse its discretion in ruling on this matter. *See Muhammad*, 928 F.2d at 1466-67.

2. Thomas Miller.

The defendants next challenge the district court's grant of the government's motion *in limine* to curtail the cross-examination of Thomas Miller. Miller had a prior state-court misdemeanor conviction for unlawful use of a weapon for which he was placed on state-court supervision for one year. The supervision was subject to revocation in the event Miller was convicted of another crime. The defendants assert that the government did not file a petition to revoke the supervision, even though Miller had pleaded guilty to a federal misdemeanor for his role in the cross burnings. Had a petition been filed, the defendants contend that Miller would have faced a one-year state prison

term. They claim Miller anticipated a benefit from the government in the form of the government not notifying the state about his federal misdemeanor conviction. As such, the defendants argue that they should have been able to question Miller on this point during cross-examination to challenge his credibility, motivation, interest, and bias.

The district court did not err in prohibiting the defendants from asking Miller about his prior state-court conviction. As the district court properly noted, "the prior conviction could not have been introduced for purposes of attacking credibility because the conviction was a misdemeanor offense that did not involve dishonesty or false statement." *Hayward*, 772 F. Supp. at 404 (citing Federal Rule of Evidence 609(a)).

Furthermore, the district court did not abuse its discretion in ruling at trial that the testimony was inadmissible under Rule 403(b) of the Federal Rules of Evidence. The court found that the testimony had low probative value, that its prejudicial impact was great, and that it could confuse and mislead the jury. Granted, Miller was facing a possible one-year prison term for violating his supervision, but he faced eighteen years in jail for his role in the two cross burnings had he not cooperated with the government. Even if Miller expected the government not to tell the state about his federal conviction, that information would have had limited probative value when weighed against the real benefit Miller received from the government: not being charged with a federal felony in exchange for his agreement to testify against the defendants.

Also, as the district court pointed out, Miller's federal conviction was not a secret. It was part of the public record. *Hayward*, 772 F. Supp. at 404. Consequently, Miller was not completely protected from having his supervision revoked, even if the government had promised not to file a petition with the state. (The record does not demonstrate that the government made any such promise to Miller.) Thus, the district court rightly found at trial that

Miller would not have been motivated to lie during his testimony to defeat a revocation of his supervision. If he did not cooperate with the government, he would have faced many years in a federal prison. If Miller were to lie in favor of the government, it would have been to prevent serving time for the federal felony charges, rather than to prevent serving one year for violating his state-court supervision. *Cf. Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

Significantly, the defendants had the opportunity during cross-examination to ask Miller about the deal he had made with the government to testify against the defendants to avoid being charged with a federal felony. The court also allowed the defendants to explore during cross-examination Miller's history of lying to law enforcement authorities during their investigation of this crime. Equally important, the defendants were able to question Miller about his testimony that he was prejudiced against black people. And, they were able to question him about his attendance at a Halloween party shortly after the cross burnings, at which he wore blackface makeup and dressed as the Buckwheat character from the "Little Rascals" movies. Around his neck was a rope tied as a noose. Richard Randall, donning a Ku Klux Klan outfit, accompanied Miller to the party and held the end of the rope that was around Miller's neck.

Because Miller took part in both cross burnings, he was a crucial government witness, whose testimony probably harmed the defendants the most. Realizing the damage Miller could do to their case, the defendants sought on cross-examination (and during their argument to the jury) to convince the jury that it was not them, but Miller who was behind the two cross burnings. They also attempted to show the jury that Miller was a bald-faced liar and that he had made an arrangement with the government to save himself to the detriment of the defendants.

We conclude that the leeway the district court gave the defendants on cross-examination was sufficient to allow

the jury to evaluate the defendants' theory of defense as well as to permit the defendants sufficient opportunities to bring the value of Miller's testimony into doubt. *See Muhammad*, 928 F.2d at 1467; *Cameron*, 814 F.2d at 406. Based on the testimony the jury heard during Miller's cross-examination, we cannot say that the jury might have had a significantly different impression of Miller's credibility, bias, interest, or motivation had they heard him testify about his state-court supervision. *Van Arsdall*, 475 U.S. at 680; *cf. Davis v. Alaska*, 415 U.S. 308, 317-20 (1974). Accordingly, we conclude that the district court did not abuse its discretion in preventing the defendants from asking Miller about his prior state-court misdemeanor conviction. "[T]he Sixth Amendment only guarantees the defendant the opportunity for effective, not limitless, cross-examination." *Muhammad*, 928 F.2d at 1466.

3. Richard Lawler.

The defendants also contend that the district court erred in granting the government's motion in limine regarding the cross-examination of Richard Lawler. They wanted Lawler to testify about how badly the government had treated him before his grand jury testimony in order for the jury to have understood Lawler's state of mind during that testimony. The defendants also maintained that this evidence would have enabled the jury to have better judged Lawler's credibility during his trial testimony. At trial, the defendants made the following offer of proof, drawn from Lawler's colloquy with the defense during its pretrial investigation:

> Question [by defense]: Did you have occasion to be debriefed or spoken to at all before you went in to the grand jury?
>
> Answer [by Lawler]: Yes, I did.
>
> Question: Who was in the grand jury besides yourself?
>
> Answer: Don Glanzer and the Washington agent.

> Question: What did they say to you at this time?
>
> Answer: They told me I had better start telling the truth or I'm going to f[---]ing jail, and then I told them I was telling the truth. Then they sort of stood up in front of me and said, "You're a f[---]ing liar, and get your f[---]ing lawyer in here right now because you're going to f[---]ing jail.
>
> Question: Was it Glanzer who said that or that Washington guy?
>
> Answer: I think the Washington guy was the one doing that in there.
>
> Question: Was he introduced as a U.S. Attorney from Washington, an FBI agent, or what?
>
> Answer: I think he was a U.S. Attorney.

We find no error in the district court's ruling to exclude the testimony regarding the alleged threats made to Lawler. The jury had already heard Lawler, a hostile, albeit insignificant,[11] witness, testify on direct examination that an Assistant United States Attorney ("AUSA") had threatened him with jail prior to his testimony before the grand jury. Such testimony was sufficient to raise any doubts in the minds of the jury members about Lawler's credibility or state of mind, without having Lawler testify about the profanity the AUSA had allegedly used with him. Such a matter, as the district court correctly pointed out to the defendants, was better suited for the court to consider, after the verdict, on a motion to dismiss the indictment based on prosecutorial misconduct: "Any broader inquiry into the existence of prosecutorial misconduct was not the province of the jury, but was more properly left to the court to be decided as a matter of law." *Hayward*, 772 F. Supp. at 404 (citing *United States v. Swiatek*, 819

[11] In the district court's opinion, Lawler's testimony did not hurt the defendants' case. The court did not understand why the government called Lawler as a witness, except maybe to preclude a missing witness instruction.

F.2d 721, 726 (7th Cir.), *cert. denied*, 484 U.S. 903 (1987)). The court also properly instructed the jury members "that they could consider questions and comments made by defendants' attorneys pertaining to alleged governmental misconduct to the extent that the material bore on the credibility of witnesses." *Id.* Thus, the district court did not abuse its discretion in curtailing the cross-examination of Lawler. *See Muhammad*, 928 F.2d at 1466-67.

4. Donald Glanzer.

The defendants further contend that the district court erred in curtailing the cross-examination of FBI Agent Donald Glanzer. The defendants maintain they were prejudiced because Agent Glanzer testified on direct examination that during his interrogation of Jeffrey Remick (a witness who testified against the defendants) Remick began to cry and told Agent Glanzer he was fearful the defendants and their friends would harm him if he testified against the defendants. The defendants argue that the district court prevented them from curing any prejudice stemming from Agent Glanzer's testimony. Specifically, they assert that the court denied them the opportunity of asking Agent Glanzer on cross-examination whether any of the other twenty-five witnesses he had interviewed in this case had ever stated that the defendants, in particular Hayward, had threatened them.

The district court did not err. The propriety of the court's decision to preclude cross-examination is obvious when the sequence of events is examined. After Agent Glanzer testified on direct examination about Remick's statement, the defendants objected and moved for a mistrial. The court denied the motion and then instructed the jury to consider Agent Glanzer's testimony regarding Remick not for the truth of the matter asserted, but for the sole purpose of determining Remick's state of mind at the time he made the statement. (These court rulings are not on appeal.)

The defendants then cross-examined Agent Glanzer. During this first cross-examination, the defendants did not ask or seek to ask questions about the twenty-five witnesses Agent Glanzer had interviewed. The government then proceeded with a redirect examination of Agent Glanzer, and the defendants had the opportunity to examine him again on recross. The threats made to Remick and Agent Glanzer's dealings with the other twenty-five witnesses were not mentioned either on redirect or on recross. The government then conducted a second redirect examination of Agent Glanzer. The questions and answers during this second redirect examination had nothing to do either with Remick's claims that the defendants had threatened him or with Agent Glanzer's dealings with the other witnesses. Nevertheless, on their second recross-examination, the defendants sought to ask Agent Glanzer questions about the threats and about his interviews with the other witnesses. The district court denied the defendants the chance to ask those questions, because the questions had no relevance to the preceding redirect examination. Consequently, we determine that the district court did not abuse its discretion in making its ruling. The defendants were restricted on their second recross-examination to asking Agent Glanzer questions that were within the scope of the questions the government had asked him on its second redirect examination. *See* Fed. R. Evid. 611(b); *United States v. Burrell*, 963 F.2d 976, 997 (7th Cir.), *cert. denied*, 113 S.Ct. 357 (1992).

5. Conclusion.

We conclude that the district court did not abuse its discretion in making its evidentiary rulings. No Sixth Amendment violations took place. The restrictions the court placed on the defendants' cross-examination of the witnesses did not deprive them of a meaningful opportunity to elicit relevant information that was likely to impeach the credibility of the witnesses or show their bias, interest, or motivation. *See Muhammad*, 928 F.2d at 1466-67; *Cameron*, 814 F.2d at 406.

D. Prosecutorial Misconduct

In the defendants fourth and final point on appeal, they claim the district court erred in not dismissing the indictment on the ground of prosecutorial misconduct. The defendants contend the government threatened four witnesses, who had testified against the defendants, with perjury prosecutions unless they told the truth. The defendants also maintain that the government used abusive and profane language toward two of those witnesses. According to the defendants, the government's conduct could have reasonably caused the witnesses to have conformed their testimony to support the government's position, thus violating the defendants' due process rights.

As this court has made clear, "due process grants wide leeway to law enforcement agencies in their investigation of crime. Assuming that no independent constitutional right has been violated, governmental misconduct must be *truly outrageous* before due process will prevent conviction of the defendant." *United States v. Kaminski*, 703 F.2d 1004, 1009 (7th Cir. 1983) (emphasis added). We note that this circuit has questioned the validity of the doctrine of outrageous government conduct and has yet to overturn a conviction on that ground. *E.g., United States v. Olson*, 978 F.2d 1472, 1481 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1614 (1993); *United States v. Miller*, 891 F.2d 1265, 1267 (7th Cir. 1989).

1. Alleged Wrongful Conduct.

The alleged prosecutorial misconduct took place with the following witnesses: Richard Lawler, Scott Haga, Thomas Hagen, and Jeffrey Remick. The defendants contend that an AUSA told Richard Lawler before he testified to the grand jury that he was a "f---ing liar" and that unless he told the truth he was going to "f---ing jail." The defendants maintain that an FBI agent told Scott Haga, in front of Haga's five-year old son, that Haga would be sentenced to five years in jail for perjury unless he testified truthfully. With regard to Thomas Hagen, the defendants

assert that an FBI agent told him he would go to jail unless he told the truth during his testimony. Lastly, the defendants contend that two AUSAs yelled at Jeffrey Remick before he testified to the grand jury. They claim the AUSAs told Remick to "shut the f--- up," called him "a smart ass punk" and a "motherf---er," and said he was a "f---ing liar," who would go to jail for five years if he perjured himself and that he would make the inmates in prison a "nice girlfriend."

The government denies using any profanity with Remick, except that one of the AUSAs told him to "shut the f--- up" when he refused to quit yelling and using coarse language. The government is silent about its use of profane language with Lawler. The government further denies that anyone told Remick that he would have made another inmate a "nice girlfriend." The government concedes, however, that it applied pressure on the witnesses to tell the truth, because those witnesses were recalcitrant at first about talking to the government, about inculpating the defendants, or even about telling the truth during their testimony. But, the government underscores that each of the four witnesses did testify truthfully and, as such, the tactics it used did not prejudice the defendants in any way.

2. Conduct Not Outrageous.

We conclude that the facts of this case do not demonstrate prosecutorial misconduct on behalf of the government. The alleged conduct was not so outrageous that it violated the defendants' due process rights. *Miller*, 891 F.2d at 1267; *Kaminski*, 703 F.2d at 1009. Although we do not condone the government's use of profanity with any witness, the record before us does not support the conclusion that the government used such outrageous language with the witnesses that a dismissal of the indictment would be warranted. In addition, nothing in the record indicates that any of the four witnesses lied while testifying, or that the government told them to lie. On

the contrary, the evidence shows that they each told the truth during their testimony.

Granted, the government told the witnesses that they had to testify truthfully and, if not, they would go to jail. That procedure, however, even if carried out in a caustic manner, is no cause to dismiss the indictment against the defendants. *See United States v. Holloway*, 778 F.2d 653, 655 (11th Cir. 1985), *cert. denied*, 476 U.S. 1158, *and cert. denied*, 478 U.S. 1009 (1986). As the district court properly noted, "[t]here is nothing wrong with the government informing witnesses of the consequences of breaking the law." *Hayward*, 772 F. Supp. at 406 (citing *Holloway*, 778 F.2d at 657); *see also United States v. Viera*, 839 F.2d 1113, 1115 (5th Cir. 1988) ("A prosecutor is always entitled to attempt to avert perjury and to punish criminal conduct.").

Moreover, in this case, the government was faced with trying to solve a crime that took place in a small, close-knit community. Most of the people involved in the crime, or who knew about it, were either related or had known each other for many years. As would be expected, the government initially came up against a wall of silence and a labyrinth of lies in its investigation of this crime. In that regard, the government was justified in applying lawful pressure on the witnesses to convince them that they had to testify truthfully. *See United States v. Bounos*, 730 F.2d 468, 470 (7th Cir. 1984) (" '[I]n evaluating whether government conduct is outrageous the court must consider the nature of the crime and the tools available to law enforcement officers to combat it.' ") (quoting *United States v. Twigg*, 588 F.2d 373, 378 n.6 (3d Cir. 1978)). As a result, we affirm the district court's denial of the defendant's motion to dismiss the indictment on the basis of prosecutorial misconduct.

3. Hayward's Bond and Detention.

Included within Hayward's contentions about prosecutorial misconduct, he makes a sparse argument that he was

prejudiced when, prior to his sentencing, the government held an *ex parte* proceeding before the district court and had his bond revoked on charges that he had attempted to bomb Thomas Hagen's truck. Hayward maintains that a defense investigation uncovered that another person had tried to bomb the truck. Even so, as the district court stated in response to this very argument:

> Hayward appears to be under the mistaken impression that the court detained him because of an incident involving Tom Hagen. In fact, the court's decision was based on Hayward's inability to rebut the presumption of detention in 18 U.S.C. § 3143(a)(2). Hayward failed to show that there was a substantial likelihood that he would succeed on a motion for acquittal or a motion for new trial. Since the court has again rejected Hayward's arguments in its denial of defendant's motion for acquittal or a new trial, the court finds no basis for reconsidering defendant Hayward's detention pending sentencing.

Hayward, 772 F.Supp. at 406-07; *see also United States v. Hayward*, 767 F. Supp. 928, 929-30 (N.D. Ill. 1991) (granting the government's motion to detain Hayward pending sentencing). On appeal, Hayward has not alleged any facts to overcome the presumption of detention. The district court's reason, therefore, to detain him pending sentencing was adequate, and we find no error.

III. Conclusion

The district court did not err with respect to any of the four points on appeal. The court properly applied 18 U.S.C. § 844(h)(1) and 42 U.S.C. § 3631(b) to this case. The court was also within its discretion to limit the cross-examination of certain witnesses, and the court correctly determined that the government's conduct toward some of the witnesses did not reach the level of prosecutorial misconduct. Likewise, the district court did not err in revoking Hayward's bond and in detaining him pending sentencing. Accordingly, the district court is AFFIRMED.

FLAUM, *Circuit Judge*, concurring. I join the court's opinion as to its application of 18 U.S.C. § 844(h)(1) and concur in the judgment as to its application of 42 U.S.C. § 3631. I write separately in order to express some additional thoughts about these statutes which were used to convict Hayward and Krause.

To begin with, I agree with the majority that under the prevailing rules of statutory construction, we are obliged to take 18 U.S.C. § 844(h)(1) at its word to enhance the punishment of any individual who "uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States." I am dubious about whether Congress intended cross burnings to fall under section 844(h)(1), which—the legislative history strongly indicates—was amended to include the word "fire" for the purpose of facilitating the prosecution of arson-related offenses. *See United States v. Lee*, 935 F.2d 952, 958 (8th Cir.), *vacated on other grounds, reh'g en banc granted in part*, 1991 U.S. App. LEXIS 18740 (Aug. 14, 1991); *cf.* John Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 Am. Crim. L. Rev. 151 (1985) (describing the efforts of "creative prosecutors" to adapt federal statutes, including 18 U.S.C. § 844, to cover greater numbers of arson-related crimes). Nevertheless, since the plain meaning of the statute encompasses offenses of this type, I believe that its application to the facts of this case was not improper.

I also agree that it was proper to apply 42 U.S.C. § 3631 to the defendants' actions, but I would approach the question of that statute's constitutionality differently than the majority. In my view, determining how to apply the Supreme Court's recent decision in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), a sharply divided 5-4 ruling, is a difficult matter. I conclude that although section 3631 and the ordinance under review in *R.A.V.* bear a superficial similarity, their internal structures differ in a crucial respect that requires us to uphold this law.

Section 3631, as the majority states, is part of the "Prevention of Intimidation" subchapter of the Fair Housing

Act. The subsection applicable to this case punishes by misdemeanor any individual who "by force or threat of force willfully injures, intimidates or interferes with—. . . any person because he is or has been, or in order to intimidate such person . . . from—participating, without discrimination on account of race, color, religion, sex, handicap . . . , familial status . . . , or national origin" in the occupation of any dwelling. 42 U.S.C. § 3631(b). While section 3631(b) bans the use of pure force as a means of intimidation, this case involves the other activity that it proscribes: the making of threats.

A threat is made when the threatener informs the recipient of his threat that he is contemplating the infliction of some harm upon another, often the recipient himself. Either words or symbols may be the medium of a threat; as anyone familiar with our nation's history is aware, a burning cross is no less effective at communicating the intended message than are written or spoken words. Although threats have undeniable expressive content (indeed, speech qualifies as a threat by virtue of the message it expresses), the First Amendment poses no special obstacle to their prohibition. Threats interfere with the rights of individuals to be free from the fear of violence; they are disruptive and costly to society; and they usually contribute little or nothing to the marketplace of ideas. *See Rogers v. United States*, 422 U.S. 35, 46-47, 95 S. Ct. 2091, 2098, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring); *United States v. Velasquez*, 772 F.2d 1348, 1356-58 (7th Cir. 1985), *cert. denied*, 475 U.S. 1021, 106 S. Ct. 1211, 89 L.Ed.2d 323 (1986). For that reason, one influential commentator has argued that the making of threats, like the use of speech to commit perjury or extortion, fix prices, place bets with bookies, and so on, falls entirely outside the coverage of the First Amendment's protection. *See* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265, 267-82 (1981), cited in *R.A.V.*, 112 S. Ct. at 2563 (Stevens, J., concurring in the result).

Congress has passed numerous laws that proscribe threats. *See, e.g.*, 18 U.S.C. § 871 (threats against the president and successors to the presidency); *id.* § 876 (threats by mail to injure or kidnap); *id.* § 1513 (retaliatory threats against informants and witnesses); *id.* § 115 (threats to assault, kidnap, or murder federal officials). These statutes have been consistently upheld as constitutional, despite the fact that they criminalize utterances because of their expressive content. *See Watts v. United States*, 394 U.S. 705, 707-08, 89 S. Ct. 1399, 1400-01, 22 L.Ed.2d 664 (1969) (per curiam) (holding that the First Amendment does not protect "true threats" against the President); *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970) ("[S]peech is not protected when it is the very vehicle of the crime itself. *E.g.*, . . . 18 U.S.C. §§ 871-877 (1964) . . . (Extortion and Threats)."); *see also Boos v. Barry*, 485 U.S. 312, 326, 108 S. Ct. 1157, 1166, 99 L.Ed.2d 333 (1988) (commenting favorably on a law that prohibits activity undertaken to "intimidate, coerce, threaten, or harass").

To say that threats are proscribable, however, does not end the matter as to the constitutionality of section 3631. The controversial holding of *R.A.V. v. City of St. Paul* was that while an entire category of speech may be proscribable (obscenity or fighting words, for example), it may be impermissible to proscribe only a subset of that category if the subset is drawn along content-based lines. In *R.A.V.*, for example, the Court held that although it may be permissible to proscribe all fighting words, it is impermissible to proscribe only those fighting words that "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender," as did St. Paul's Bias-Motivated Crime Ordinance, as construed by the Minnesota Supreme Court. The Court revised its long-standing view of fighting words, stating that they are not truly "categories of speech entirely invisible to the Constitution" as some earlier cases had held, and therefore they "may [not] be made the vehicles for content discrimination unrelated to their distinctively proscribable content."

R.A.V., 112 S. Ct. at 2543. In the Court's view, singling out for proscription speech that is "addressed to . . . specified disfavored topics," even if those topics are communicated by means of fighting words, is an impermissible effort at censorship by the government. *See id.* at 2547.

R.A.V. identified several limited exceptions to this overarching precept of content-neutrality. First, the Court explained, content-based distinctions may be drawn within a class of proscribable speech if the basis for the distinction is "the very reason the entire class is proscribable." The Court offered the following example, helpful for analysis of the present case.

> The federal government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871—since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that violence will occur) have special force when applied to the person of the President. *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 1401, 22 L.Ed.2d 664 (1969) . . . . But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities.

Id. at 2546. Second, a content-defined subclass may be treated differently if the subclass is associated with "particular 'secondary effects' " of the speech, so that "the regulation is '*justified* without reference to the content of the speech.' " *Id.* (quoting *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48, 106 S. Ct. 925, 929, 89 L.Ed.2d 29 (1986) (quoting, with emphasis, *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S. Ct. 1817, 1830, 48 L.Ed.2d 346 (1976))). The Court included under this exception laws directed at conduct that "incidentally" sweep up a content-based subcategory

of a proscribable class of speech.[1] Finally, the Court offered a "catch-all" exception that other bases for distinction may be valid, even if non-neutral, so long as "there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 2547.

Under the *R.A.V.* analysis, section 3631 seems functionally similar to St. Paul's Bias-Motivated Crime Ordinance. Like the ordinance, section 3631 selects a subclass of threats from the larger proscribable class of all threats apparently on the basis of the message conveyed—because they express hostility to the idea that blacks and whites should share housing together. It may be possible, however, to uphold section 3631 under the first of *R.A.V.*'s three limited exceptions. The reason threats are proscribable in the first place is the fear that they arouse in listeners; that fear, which one might frame as a "psychological injury," may be offered as a reason for regulating this subclass of threats that is unrelated to the suppression of speech. In their concurrences, several Justices argued that the St. Paul ordinance should be judged constitutional on precisely this reasoning. Borrowing the majority's example, Justice Stevens argued:

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[1] I disagree with the majority's view that section 3631 falls under this exception. *R.A.V.* gives as examples a law against treason, which would be violated by telling the enemy the nation's defense secrets, and Title VII's prohibition of sexual discrimination in employment practices, which might be violated by speaking sexually derogatory fighting words. Both of these are general laws that incidentally burden speech, therefore meriting treatment under the more permissive test of *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968). Section 3631, on the other hand, regulates threats directly, not merely as an instance of some broader practice such as "treason" or "discrimination." *Cf. Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.*, 968 F.2d 286 (2d Cir. 1992) (applying *R.A.V.* to uphold state and federal antidiscrimination laws that were violated by defendants' efforts, some via speech, to make a resort facility breach its contract with the plaintiff organization).

> Just as Congress may determine that threats against the President entail more severe consequences than other threats, so St. Paul's City Council may determine that threats based on the target's race, religion, or gender cause more severe harm to both the target and to society than other threats. This latter judgment—that harms caused by racial, religious, and gender-based invective are qualitatively different from that caused by other fighting words—seems eminently reasonable and realistic.

Id. at 2565 (Stevens, J., concurring in the judgment); *see also id.* at 2556 (White, J., concurring in the judgment) ("This selective regulation reflects the City's judgment that harms based on race, color, creed, religion, or gender are more pressing public concerns than the harms caused by other fighting words. In light of our Nation's long and painful experience with discrimination, this determination is plainly reasonable."); *id.* at 2560-61 (Blackmun, J., concurring in the judgment).[2]

The same arguments could be raised in relation to section 3631. However, the *R.A.V.* majority specifically rejected the claim that the subclass of fighting words regulated by St. Paul—words that incite on the basis of race, color, creed, religion, or gender—could be singled out because of some special injury they cause. The Court maintained that it was "word-play" to say that the ordinance targeted particular harms caused by the speech, rather than the content of the speech itself. "What makes the anger, fear, sense of dishonor, etc. produced by violation of this ordinance distinct from the anger, fear, sense of

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[2] In a penetrating analysis of the *R.A.V.* decision, Professor Akhil Amar argues that all of the opinions, majority and concurring, would have been enriched by consideration of how the Thirteenth and Fourteenth Amendments bear on the St. Paul ordinance. One might underscore the point in connection with the passages from the concurrences cited above. *See* Akhil Reed Amar, *The Supreme Court, 1991 Term—Comment: The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 Harv. L. Rev. 124 (1992).

dishonor, etc. produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily." *R.A.V.*, 112 S. Ct. at 2548. If the *R.A.V.* majority rejected the idea that fighting words—words that "by their very utterance inflict injury," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L.Ed. 1031 (1942)—could be subcategorized along these lines in light of the greater harm caused by racist or sexist fighting words, then it would be unlikely to uphold a similar classification among threats—words that create a fear of violence—on the theory that threats targeted against individuals who share housing with members of minority groups cause greater fear or more severe disruption.

Since the crucial question is whether the statute regulates speech because of its content or message, however, there is an important dissimilarity in the structure of these two laws. The critical language in the St. Paul statute, unaffected by the Minnesota Supreme Court's gloss, is that speech is proscribed that insults or provokes violence "*on the basis* of race, color, creed, religion, or gender." Banning speech because of the type of reaction it would engender in the listener, the majority reasoned, necessarily requires an examination of the content of that speech. The ordinance thus attempted to control which messages could be communicated via fighting words. The "on the basis of" language by itself compels an examination of content.

Section 3631, on the other hand, forbids threats directed at an individual "*because* he is . . . or *in order to* intimidate such person from" participating in the exercise of housing rights without discrimination. Section 3631 focuses neither on the content of the threat nor on the effect that it is likely to cause in the listener, but rather on the choice of victim or on the motive of the person making the threat. Indeed, the precise message of the threat does not determine whether section 3631 has been violated.

There is no need to consider whether the victim is threatened with a violent act or some undefined harm (e.g., "Do what we want or else"); whether the threat is unconditional or is promised to occur "unless" the victim takes some action; or whether some particular idea (e.g., that blacks and whites should not live together) is expressed thereby. It may turn out, of course, that the wording of a written threat helps to determine whether the threat was made because the victim was participating in the protected activities, but the purpose of the statute is not to ban communication of that message.

Although this distinction may seem illusory, it dovetails with a distinction drawn by the *R.A.V.* majority itself.

> What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) messages of "bias-motivated" hatred and in particular, as applied to this case, messages "based on virulent notions of racial supremacy." [*In re Welfare of R.A.V.*,] 464 N.W.2d [507], 508, 511 [(Minn. 1991)].

R.A.V., 112 S. Ct. at 2548 (emphasis in original). This passage indicates that a legislature may select a group to protect specially from the harm of fighting words (or, by extension, threats), and pass legislation that prohibits individuals from using those forms of speech against them. An equivalent way to write such a law would be to focus on the perpetrator, rather than the speech itself, and to consider whether he chose his victims because they belong to the protected group.[3]

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[3] This past Term, in *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993), the Supreme Court upheld a Wisconsin statute that enhances the penalty for an offense if the offender intentionally selected his vic-

(Footnote continued on following page)

Justice Stevens argued that the majority had drawn a distinction without a difference, since the reason why a legislature would selectively proscribe speech aimed at certain persons or groups ("for example, a law proscribing threats against the elderly") would be its determination that the harm caused by the regulated expression differed from that caused by other unregulated expression ("the elderly are more severely injured by threats than are the nonelderly")—a justification that the majority had declared invalid because it was based on the message behind the words. *See id.* at 2565 (Stevens, J., concurring in the judgment). There are other reasons to doubt whether it would be possible to prohibit speech that is "directed at certain persons or groups" without resorting to content discrimination. Fighting words or threats directed at certain persons or groups may be conceptualized in two ways. A threat worded "I plan to kill you" and mailed to an elderly person would fall under a prohibition on threats against the elderly (to borrow Justice Stevens' example) without any recourse to the content of the threat itself. On the other hand, a poster nailed onto someone's front door that contained a threatening diatribe against elderly people living in the community would violate the law only in light of its content, the idea it was trying to express. The point, of course, is that the choice of persons or groups targeted by a threat, whether stated explicitly in the threat or merely implied from the surrounding circumstances, is an essential component of the message that the threat means to communicate.

One may similarly question whether there is any constitutional difference between a prohibition on threats

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[3] *continued*
tim "because of the race, religion, color, disability, sexual orientation, national origin or ancestry" of that person. The Court rebuffed the argument that the statute punishes bigoted thought. It did note, however, that the Wisconsin law aims at conduct—namely, violence—that, unlike speech, receives no First Amendment protection.

directed against those who entertain members of minority groups in their homes and a prohibition on threats that cause fear "on the basis of" someone's exercise of housing rights without discrimination. The constitutionality of a law ought not depend, it would seem, on which of two functionally equivalent ways it is written. In any case, I conclude that section 3631 draws permissible lines within the class of proscribable threats. While I hope that the court's ruling in this case does not bear out Justice White's fear that *R.A.V.* "will surely confuse the lower courts," *id.* at 2560 (White, J., concurring in the judgment), I believe that the result it reaches is sound under that decision and under traditional First Amendment principles.

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: October 5, 1993

BEFORE:

Honorable Joel M. Flaum, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Robert L. Miller, Jr., District Judge*

Nos. 91-3253 and 91-3568

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

KENNETH T. HAYWARD, et al.,

Defendants-Appellants

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 91 CR 25--Nicholas J. Bua, Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered this date.

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* The Honorable Robert L. Miller, Jr. District Judge for the Northern District of Indiana, is sitting by designation.

[772 F.Supp. 399 (N.D. Ill. 1991)]

UNITED STATES OF America, Plaintiff,

v.

Kenneth Thomas HAYWARD and William Bradford Krause, Jr., Defendants.

No. 91 CR 25.

United States District Court,
N.D. Illinois, E.D.

Aug. 26, 1991.

Nunc Pro Tunc Aug. 26, 1991.

* * * * *

ORDER

BUA, District Judge.

After a nine-day jury trial, defendant Kenneth Thomas Hayward was found guilty of having violated 18 U.S.C. § 241, 42 U.S.C. § 3631(b) and 18 U.S.C. § 844(h)(1). Defendant William Bradford Krause was found guilty of having violated those same provisions along with violating 18 U.S.C. § 1512(b)(1) and 18 U.S.C. § 924(c)(1). Defendants Hayward and Krause now bring a joint motion for judgment of acquittal notwithstanding the verdict or, in the alternative, for a new trial. They have also filed a motion seeking to dismiss the indictment due to prosecutorial misconduct. Defendant Hayward further requests that the court reconsider its decision to detain him pending sentencing. For the reasons stated below, the court denies defendants' motions.

MOTION FOR ACQUITTAL OR NEW TRIAL

Defendants raise a whole slew of grounds in support of their motion. Unfortunately, defendants do no more than proffer a perfunctory argument for each and then move on to the next. Nevertheless, the court has considered their arguments. The court finds that defendants' motion for acquittal or a new trial should be denied.

I. Count Four—18 U.S.C. § 844(h)(1)

Many of the grounds asserted by defendants were raised at different times before and during trial. This claim is no exception. Defendants argue that an 18 U.S.C. § 844(h)(1) offense was improperly charged in the present case since the facts do not add up to an arson-type offense. As the court expressed in its ruling on defendants' Motion for a Directed Verdict, it finds that the § 844(h)(1) offense was properly charged on these facts.

Defendants base their argument on the legislative history behind the provision. In support, they cite *United States v. Lee*, 935 F.2d 952 (8th Cir. 1991) in which that court relied on legislative history for its finding that 18 U.S.C. § 844(h)(1) is not a proper charge for a cross-burning where there has been no damage to persons or property by the use of fire. *Id.* at 958.

Defendants' suggested analysis, though, puts the cart before the horse. "Where . . . resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." *Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984). The court finds it unnecessary to consult legislative history here since the lan-

guage of the statute is clear. 18 U.S.C. § 844(h)(1) is unequivocal on its face that it prohibits persons from using fire to commit any felony which may be prosecuted in the courts of the United States. There are no limiting clauses in the statute to suggest that § 844(h)(1) only applies to arson-type offenses or circumstances involving the destruction of property. In fact, a reading of the entire statute would argue against such a limited interpretation. The very next provision in the statute, § 844(i), prohibits persons from using fire to maliciously damage or destroy property. If § 844(h)(1) were read in the manner suggested by defendants, the two provisions would be virtually the same.

In *United States v. Worthy*, 915 F.2d 1514 (11th Cir. 1990), the Eleventh Circuit came to the same conclusion in interpreting the sentencing guideline section which formerly applied to § 844(h)(1). The court found that there was nothing in the language of that section (the former terms of the section and the current terms of the statutory provision are the same) to indicate that it was intended to apply only to arson offenses. "From [the] clear and unambiguous words [of the section] we can only conclude that the use of 'fire or an explosive to commit another offense that is a felony under federal law' . . . falls under the ambit [of the section]" "whether or not such use of fire constitutes legal arson." *Id.* at 1517; *accord United States v. Long*, 935 F.2d 1207, 1212 (11th Cir. 1991). For these reasons, defendants' argument fails.

II. Count One—Sufficiency of the Evidence

Defendants next claim that the evidence linking the two cross-burning incidents was insufficient to support the Court One conspiracy conviction. The court disagrees. In

a sufficiency of evidence challenge, the court must consider the evidence in the light most favorable to the government. *United States v. Jeffers*, 520 F.2d 1256, 1269 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066, 96 S.Ct. 805, 46 L.Ed.2d 656 (1976). The evidence in this case shows that the two cross-burnings were part of one conspiracy. Both cross-burnings were directed at the same home. As the jury found, the aim of the two cross-burnings was to intimidate the residents of the home and to interfere with their right to associate with persons of another race. Defendant Krause was a participant in both the first and second cross-burnings. Although defendant Hayward did not act in the first cross-burning, evidence submitted at trial showed that he knew about the first cross-burning and was aware of its purpose. He later participated in the second cross-burning. The common purpose and cast of characters of the two cross-burnings place them in the same conspiracy.

III. Motion to Suppress

Defendants reiterate their argument that the .22 caliber semi-automatic pistol recovered from Susan Hayward, defendant Hayward's wife, should have been suppressed along with any statements she might have made. The court ruled in *United States v. Hayward*, No. 91-25 (N.D. Ill. April 25, 1991) (1991 WL 64233) that defendant Hayward lacked standing to bring such a claim. That ruling remains unchanged.

IV. Multiplicity of Counts One and Four

Defendants raised the same multiplicity argument in their Motion to Dismiss Count Four. The court rejected the argument then (*United States v. Hayward*, 764 F. Supp. 1305, 1307 (N.D. Ill. 1991)) and rejects it now.

V. Count Four—Failure to Charge an Offense

It has already been established that the government properly set out the elements necessary to charge an offense under 18 U.S.C. § 844(h)(1). *See Hayward*, 764 F. Supp. at 1308. That decision need not be revisited.

VI. Motion for Severance

Defendants next challenge the court's denial of defendants' motion to sever counts or, in the alternative, to sever defendants. Defendants contend that Counts Six and Seven never should have been tried with the other counts in the indictment. Under Fed.R.Crim.P. 8(a), two or more offenses may be charged in the same indictment where the offenses are of the same or similar character; are based on the same act or transaction; or are two or more acts connected together or constituting parts of a common scheme or plan. Counts Six and Seven were properly joined in this indictment since they were part of a common scheme or plan. The acts in those counts were committed because of the offenses in Counts One through Four. Any possible spill-over effect was minimized by the court's instruction to the jury, whenever evidence of Counts Six and Seven arose, that the evidence was to be considered only against defendant Krause, not defendant Hayward. The jury instructions also contained this admonition. Severance of counts, therefore, was not necessary.

In addition, defendants asked for separate trials. Fed.R. Crim.P. 8(b) allows two or more defendants to be charged in the same indictment if they are alleged to have participated in the same series of acts or transactions constituting an offense or offenses. Defendants challenged their joinder claiming that their defenses were incompatible. "[S]uch a claim will only justify severance if the defenses

'conflict to the point of being irreconcilable and mutually exclusive,' (citations omitted) 'so that acceptance of one defendant's defense will preclude the acquittal of the other defendant.' " *United States v. Bruun*, 809 F.2d 397, 407 (7th Cir. 1987) (citations omitted). That was not the case here. Prior to trial, defendant Hayward was unable to identify how the defenses were incompatible because of defendant Krause's attorney-client privilege. Therefore, the court had no basis for ordering a severance. At trial, Hayward's concern never arose. The two defendants did not point a finger at the other to avoid culpability. Instead, they both attempted to pin the blame on the government's witnesses. Thus, the court cannot conclude that one defendant's defense precluded the acquittal of the other. Nor can the court find that the actual conduct of one defendant's defense was unduly prejudicial to his co-defendant. Severance of defendants was also unnecessary.

VII. Motion to Excuse Juror for Cause

A juror is the next subject of attack. Defendants claim that juror Washington should have been excused for cause. Because the court did not excuse him, defendants maintain that they were forced to use a peremptory challenge which they had intended to use for another juror. During voir dire, prospective juror Washington expressed that he was troubled by the use of racially derogatory terms. Upon questioning by the court, however, Washington stated that he could put his feelings aside, apply the law as given, and reach a fair and impartial verdict based on the evidence at trial. "Where a venireman can lay aside any preconceptions about the case and try it solely on the evidence presented in court, excuse of the venireman for cause is not required." *United States v. Johnson*, 584 F.2d 148, 155 n. 16 (6th Cir. 1978), *cert. denied*, 440 U.S. 918, 99 S.Ct. 1240, 59 L.Ed.2d 469 (1979).

Moreover, defendants have not shown actual bias or prejudice arising from the denied challenge for cause and their "forced" use of a peremptory challenge. Defendants merely assert that they were unable to strike another juror. They have not provided any factual basis demonstrating prejudice such as the name of the juror they would have excused or any evidence that the unexcused juror was biased. Therefore, this ground is dismissed.

VIII. Cross-Examination

Defendants also claim that the court wrongly limited their ability to cross-examine witnesses about the alleged misconduct of law enforcement personnel. Contrary to defendants' claims, such testimony was allowed, at least to the extent that it affected witness credibility. In fact, the court even instructed the jury that they could consider questions and comments made by defendants' attorneys pertaining to alleged governmental misconduct to the extent that the material bore on the credibility of witnesses. Any broader inquiry into the existence of prosecutorial misconduct was not the province of the jury, but was more properly left to the court to be decided as a matter of law. *United States v. Swiatek*, 819 F.2d 721, 726 (7th Cir.), *cert. denied*, 484 U.S. 903, 108 S.Ct. 245, 98 L.Ed.2d 203 (1987).

IX. Cross-Examination of Thomas Miller

Defendants also challenge the limitations imposed on their cross-examination of witness Thomas Miller. Defendants contend that they should have been allowed to question Miller about a prior conviction in state court for unlawful use of a weapon in order to show lack of credibility as well as bias. However, the prior conviction could

not have been introduced for purposes of attacking credibility because the conviction was a misdemeanor offense that did not involve dishonesty or false statement. Fed.R. Evid. 609(a). The bias argument is flawed as well. There is no reason to believe that Miller would receive some benefit in connection with his prior conviction in return for his testimony in this case. Defendants hypothesize that the government might have promised not to tell state authorities about Miller's new offense in order to avoid revocation of his supervision sentence from the prior conviction. Defendants' argument is unrealistic. Federal authorities do not have a corner on information pertaining to Miller's present offense; it is a matter of public record. The government could not even make a promise of secrecy. Defendants' arguments are rejected.

X. Motion in Limine

Defendants take issue with the court's ruling that defendants could not present evidence bearing on the nature of the tenants in the home and the status of their tenancy. The court stands by its ruling that such information was not relevant to the charges at issue in the trial.

XI. Counts One, Two, Three, Four, Five—Limits on Expression

Defendant also make the sweeping claim that most of the counts violated their rights of expression. Here is where defendants' omission of argument is most glaring since they provide no legal basis for their assertions. Of the counts that defendants challenge, Counts One, Four and Five involve 18 U.S.C. § 241, Conspiracy Against Rights. The court rejects any free speech challenge to § 241. The Eighth Circuit recently considered this very

issue and found that a cross-burning charge under 18 U.S.C. § 241 is not barred by the First Amendment. *Lee*, 935 F.2d at 956. Section 241 was upheld as a content neutral statute which has as its purpose preventing conspiracies designed to threaten or intimidate others in the enjoyment of their federal rights. *Id.* at 955. The Eleventh Circuit found that Section 241 furthered an important and substantial government interest while being narrowly tailored to serve its purpose. *Id.* The court agrees and finds that § 241 does not violate the First Amendment.

As for the other counts—Counts Two, Three, and Four (defendants also appear to be challenging the use of fire element in Count Four as a restriction of free speech), the court finds that the statutes in these counts cannot be considered unconstitutional restrictions on defendants' rights of expression. In reaching this conclusion, the court follows the analysis set forth in *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). First, it must be determined whether defendants' actions in this case constituted expressive conduct. *Id.* 109 S.Ct. at 2538. The court assumed in *Lee* that the cross-burning contained elements of expressive conduct. *Lee*, 935 F.2d at 954. The same conclusion can be drawn in this case. Defendants were allegedly expressing their feelings towards the persons living in the residence by burning the cross. And, the message was certainly one the intended audience could understand.

Next, the purpose behind the government's regulation must be considered. Did the government seek to regulate defendants' actions for reasons other than the content of their speech? If so, a lesser standard of scrutiny can be applied. *Johnson*, 109 S.Ct. at 2538. The court finds that 42 U.S.C. § 3631(b) and 18 U.S.C. § 844(h)(1) are, in fact, content neutral statutes. "The test is . . . whether the

regulation is justified without reference to the content of the regulated speech." *United States v. Eichman*, 731 F. Supp. 1123, 1129 (D.D.C.), *aff'd*, ____ U.S. ____, 110 S.Ct. 1779, 108 L.Ed.2d 780 (1990). On their face and at their core, these statutory provisions forbid actions for reasons other than content of any speech which might be involved. 42 U.S.C. § 3631(b) prohibits the use of force or threat of force to injure, intimidate, or interfere with persons because of their habitation with those of another race. The purpose of the statute is not to discriminate against a certain viewpoint, but to prohibit any action, including speech, which intimidates or injures. Thus, this provision is content-neutral. *See Lee*, 935 F.2d at 954-955; *CISPES (Committee in Solidarity with the People of El Salvador) v. F.B.I.*, 770 F.2d 468, 474 (5th Cir. 1985) (18 U.S.C. § 112 which prohibits activity undertaken to intimidate, coerce, threaten or harass foreign officials does not "discriminate on the basis of the content of expression"). Nor does 18 U.S.C. § 844(h)(1) regulate speech based on its content. The statute prohibits the use of fire in connection with any activity constituting a federal felony regardless of the type of speech involved.

Therefore, the court moves to the last step in the analysis. The government must have an important and substantial interest in regulating the speech and the regulation must be narrowly tailored to serve that governmental interest. *CISPES*, 770 F.2d at 474-475. 42 U.S.C. § 3631(b) only prohibits those actions and words which injure or intimidate in order to protect the rights of persons dwelling with those of another race. And, 18 U.S.C. § 844(h)(1) was drawn to deter persons from using fire when committing an act which is illegal under federal law, thus ensuring the welfare and safety of the public. The court finds these to be important reasons that are enforced through narrowly drawn statutes. Accordingly, the court finds that

defendants' rights of expression have not been unconstitutionally restricted by the statutes underlying Counts One, Two, Three, Four and Five of the indictment.

XII. Jury Instructions

Defendants' remaining challenge is to the jury instructions. In particular, defendants claim that the court erred in not using the instructions defendants proffered for Count Four. A look at defendants' instructions for Count Four shows that the instructions advance the theory that damage to buildings or property is required in order to find a violation of 18 U.S.C. § 844(h)(1). The court disagreed with that argument and, therefore, rejected the corresponding jury instructions. As for the remainder of the instructions, the court has no way of knowing which instructions offended defendants. Thus, the court cannot tell whether defendants objected to these instructions and specifically stated the grounds for their objection. If they neglected to do so, they are now barred from assigning them as error. Fed.R.Crim.P. 30.

Since the court has rejected all the grounds which defendants have proffered in support of their motion for acquittal notwithstanding the verdict or a new trial, the court denies defendants' motion.

MOTION TO DISMISS INDICTMENT

Ever persistent, defendants next seek to dismiss the indictment due to alleged prosecutorial misconduct. "[G]overnmental misconduct must be truly outrageous before due process will prevent conviction of the defendant." *United States v. Kaminski*, 703 F.2d 1004, 1009 (7th Cir. 1983). It is defendants' contention that "the government

engaged in deceitful, misleading, abusive, and threatening conduct for purposes of tailoring witnesses' testimony to support the government's version of the events." (Motion to Dismiss the Indictment Due to Prosecutorial Misconduct in its Investigation at 1.) Defendants particularly target the government's contacts with witnesses Rich Lawler, Scott Haga, Tom Hagen and Jeff Remick. After reviewing the transcripts submitted by defendants, the court cannot find that the government's conduct towards these witnesses was prosecutorial misconduct requiring dismissal of the indictment. The government admits that it exerted pressure on the witnesses to make them testify before the grand jury and at trial. The court, though, finds insufficient evidence to support defendants' conclusory allegations that the witnesses were threatened or coerced. By the witnesses' own admissions to defense counsel and their investigator, the government's pressure primarily consisted of reminding the witnesses of their obligation to appear before the grand jury and testify truthfully. (Motion to Dismiss Indictment, Group Exhibit One at 10, 12-14, 18-19, 29, 33, 35, 36.) There is nothing wrong with the government informing witnesses of the consequences of breaking the law. *See United States v. Holloway*, 778 F.2d 653, 657 (11th Cir. 1985) (prosecutor may inform witness that he would be subject to prosecution for lying to the grand jury), *cert. denied*, 476 U.S. 1158, 106 S.Ct. 2276, 90 L.Ed.2d 719 (1986).

Nor is there any evidence that the witnesses, in fact, testified untruthfully before the grand jury because of the government's "threats." The witnesses certainly did not testify untruthfully during trial in support of the government's version of the events. On the contrary, these witnesses bent over backward to help establish the case for the defense. Given the substance of the government's ac-

tions and the lack of prejudicial effect, the court cannot find that the government engaged in the type of outrageous conduct that would warrant dismissing the indictment. *See United States v. Johnson*, 565 F.2d 179, 182 (1977) (agent's loss of temper and his cursing of defendant was not outrageous conduct based on the circumstances).[1]

MOTION TO SET ASIDE THE DETENTION OF KENNETH HAYWARD

Last, defendant Hayward seeks to have the court reconsider its decision to detain him pending sentencing. Hayward appears to be under the mistaken impression that the court detained him because of an incident involving Tom Hagen. In fact, the court's decision was based on Hayward's inability to rebut the presumption of detention in 18 U.S.C. § 3143(a)(2). Hayward failed to show that there was a substantial likelihood that he would succeed on a motion for acquittal or a motion for new trial. Since the court has again rejected Hayward's arguments in its denial of defendants' motion for acquittal or a new trial (*see supra* at 9-11,) the court finds no basis for reconsidering defendant Hayward's detention pending sentencing.

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[1] Defendants further claim that the government was uncooperative prior to trial. Defendants' allegations are unsupported. The court was never informed that the government failed to abide by the court's discovery order. Defendants also cry prosecutorial misconduct in connection with the search of defendant Hayward's home and his subsequent arrest on July 16, 1991. The court finds it unnecessary to address defendants' contentions on this score since those events had no bearing on the indictment, the trial, or any of the court's rulings.

CONCLUSION

For these reasons, the court denies all of defendants' post-trial motions.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

UNITED STATES OF AMERICA

V. Case Number: 91 CR 25-1

KENNETH THOMAS HAYWARD

George P. Lynch
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count(s) one, three and four after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
USC 241	Conspiracy to interfere with civil rights	4 Sep 89	1
USC 3631(b)	Use of force to intimidate	4 Sep 89	3
USC 2	Aiding and abetting	4 Sep 89	3
USC 844(h)(1)	Use of fire to commit a felony	4 Sep 89	4

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) five and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

☐ It is ordered that the defendant shall pay a special assessment of $125.00, for count(s) one, three and four, which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

* * * * *

September 25, 1991
Date of Imposition of Sentence

_____
Signature of Judicial Officer

NICHOLAS J. BUA, JUDGE
Name & Title of Judicial Officer

September 25, 1991
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of EIGHTEEN (18) MONTHS on counts one and three, to run concurrently with each other, and a term of SIXTY (60) MONTHS on count four to run consecutive to the term imposed on counts one and three.

It is ordered that defendant be given credit for time already served.

☒ The court makes the following recommendations to the Bureau of Prisons: That defendant be incarcerated at Oxford, Wisconsin.

* * * * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of TWO (2) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

* * * * *

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

* * * * *

Guideline Range Determined by the Court:

Total Offense Level: 15

Criminal History Category: I

Imprisonment Range: 18 to 24 months plus 5 years mandatory to follow

Supervised Release Range: 2 to 3 years

Fine Range: $4,000 to $40,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: none

☐ Full restitution is not ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

* * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

UNITED STATES OF AMERICA

V. Case Number: 91 CR 25-2

WILLIAM BRADFORD KRAUSE, JR.

Leland Shalgus
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count(s) one, two, three, four, six and seven after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 241	Conspiracy to deny civil rights	4 Sep 89	1
42 USC 3631(b)	Intimidation	4 Sep 89	2 & 3
18 USC 844(h)(1)	Use of firearm to commit felony	4 Sep 89	4
18 USC 1512(b)(1)	Threatening a witness	5 Dec 90	6

18 USC 924(c)(1)	Use of firearm in commission of a violent crime	5 Dec 90	7

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $250.00, for count(s) 1, 2, 3, 4, 6 and 7, which shall be due ☒ immediately ☐ as follows.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

* * * * *

October 30, 1991
Date of Imposition of Sentence

_____
Signature of Judicial Officer

NICHOLAS J. BUA, JUDGE
Name & Title of Judicial Officer

October 30, 1991
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THIRTY-THREE (33) MONTHS on counts 1, 2, 3, and 6 to run concurrently with each other; a TERM OF SIXTY (60) MONTHS on count 4 to run consecutively to the term imposed on counts 1, 2, 3, and 6; and a TERM OF SIXTY (60) MONTHS on count 7 to run consecutively to the term imposed on count 4.

It is ordered that defendant be given credit for time already served.

* * * * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of TWO (2) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

The defendant shall submit to urinalysis testing and/or any treatment necessary for his substance abuse problem.

* * * * *

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

* * * * *

Guideline Range Determined by the Court:

Total Offense Level: 20

Criminal History Category: I

Imprisonment Range: 33 to 41 months, plus two mandatory five year terms

Supervised Release Range: 2 to 3 years

Fine Range: $7,500 to $75,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: none

☐ Full restitution is not ordered for the following reasons:

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

* * * * *

Supreme Court, U.S.
FILED
MAR 4 1994
OFFICE OF THE CLERK

No. 93-1063

In the Supreme Court of the United States

OCTOBER TERM, 1993

KENNETH T. HAYWARD AND WILLIAM B. KRAUSE, JR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 844(h)(1), which mandates an additional penalty for a person who "uses fire * * * to commit any felony which may be prosecuted in a court of the United States," may properly be applied in federal cross-burning prosecutions.

2. Whether 42 U.S.C. 3631 is unconstitutional on its face because it prohibits threats against individuals exercising their federally guaranteed right to obtain housing without regard to race, color, religion, sex, handicap, familial status, or national origin, but does not prohibit threats based on other characteristics.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1063

KENNETH T. HAYWARD AND WILLIAM B. KRAUSE, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-41) is reported at 6 F.3d 1241. The opinion of the district court denying petitioners' motion for judgment of acquittal notwithstanding the verdict, or, in the alternative, for a new trial (Pet. App. 43-56) is reported at 772 F. Supp. 399.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42) was entered on October 5, 1993. The petition for a writ of certiorari was filed on January 3, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 844(h) and 42 U.S.C. 3631, the two statutory provisions involved in this case, are reprinted at pp. 2-3 of the petition.[1]

STATEMENT

1. On Labor Day weekend, 1989, petitioner Krause burned two crosses on the driveway of the Joneses, a white family living in Keeneyville, Illinois. Pet. App. 2-3. Petitioner Hayward built and participated in burning the second of these crosses. *Id.* at 3. The Joneses had entertained black guests in their home during that weekend. *Id.* at 2.

Petitioner Krause burned the first cross with the assistance of Thomas Miller and Steven Randall. Pet. App. 2. The finished cross stood six and a half feet high and was four and a half feet wide. *Ibid.* After Miller covered the cross with a mixture of gasoline and petroleum jelly, the three men carried it with a cement cinder block to the Joneses' house at about 8:00 that night. *Ibid.* They first placed the cross in the cinder block on the edge of the driveway, and Krause attempted to light it. *Id.* at 2-3. When the cross did not light, Krause got more gasoline. The men moved the cross further up the driveway and doused it with gasoline; Krause lit it, and all three fled. *Id.* at 3.

Later the same night petitioner Hayward built the second cross, which stood seven feet high and was five

[1] In one respect, however, 42 U.S.C. 3631 is inaccurately reprinted in the petition. The phrase "handicap (as such term is defined in section 3602 of this title), familial status (as such term is defined in section 3602 of this title)" appears after the word "sex" in subsections (a), (b)(1), and (c).

feet wide. Pet. App. 3. Hayward, Miller, and Krause soaked the cross in diesel fuel, drove it to the Joneses' house in a truck, and placed it in the same cinder block that had held the first cross. *Ibid.* Hayward lit the cross, and the three men sped away in the truck. *Ibid.* Miller testified that, as they drove away, Hayward fired a handgun five or six times at the house. *Id.* at 3 n.2; Tr. 414-416.

A neighbor saw the second cross burning and awoke Pam Rayan, a member of the Jones family. Pet. App. 3. Rayan and her children saw the second cross and were frightened by it. *Ibid.* The neighbor called the fire department because the burning cross threatened to set a nearby tree on fire. *Ibid.*

2. Petitioners were indicted by a federal grand jury. They were charged with felony conspiracy to violate civil rights, in violation of 18 U.S.C. 241; use of fire to commit a federal felony, in violation of 18 U.S.C. 844(h)(1); criminal interference with housing rights, in violation of 42 U.S.C. 3631; and use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). Krause was also charged with intimidating and threatening a witness in connection with the investigation of the crime, in violation of 18 U.S.C. 1512(b)(1). Pet. App. 4.

After a jury trial, Krause was found guilty on all counts. Pet. App. 61-62. Hayward was acquitted on the Section 924(c)(1) charge but was found guilty on all other counts. Pet. App. 57-58. Petitioners filed a joint motion for judgment of acquittal notwithstanding the verdict or, in the alternative, for a new trial, which the district court denied. See *id.* at 43-56. In denying the motion, the district court rejected petitioners' contention that Section 844(h)(1) was

inapplicable to their conduct because there had been no damage to persons or property. Pet. App. 44-45. The district court also rejected petitioners' contention that their convictions violated their First Amendment rights. Pet. App. 50-53.

3. On appeal, petitioners challenged their convictions on several grounds, two of which are relevant here. They contended (Hayward C.A. Br. 18-28, Krause C.A. Br. 6) that 18 U.S.C. 844(h)(1) was intended to apply only to cases of arson involving damage to property or persons. Petitioners also argued that their convictions under 42 U.S.C. 3631 violated their First Amendment rights. Hayward C.A. Br. 41-50; Krause C.A. Br. 6.[2] They did not contend that the evidence in this case was insufficient to establish a violation of Section 3631. Nor did they claim that the application of Section 844(h)(1) to their conduct violated the First Amendment.

[2] Relying on this Court's opinion in *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538 (1992), petitioners argued (Hayward C.A. Br. 45) that "42 U.S.C. § 3631(b) applies only to the subject of race. Arguably, the statute allows force or the threat of force, with an abusive [invective] no matter how vicious or severe, unless addressed to a racial topic. As in *R.A.V.*, the statute in the instant case prohibits bias-motivated hatred and messages based on racial supremacy. Applying the Court's analysis from *R.A.V.*, 42 U.S.C. § 3631 is content-based and facially unconstitutional."

Petitioner's characterization of the statute is factually inaccurate. The coverage of Section 3631 is not limited to race-based threats. Rather, the statute prohibits the use or threat of force for the purpose of preventing individuals from exercising their rights to obtain housing free from discrimination based on race, color, religion, sex, handicap, familial status, or national origin.

The court of appeals affirmed. Pet. App. 1-41. In upholding petitioners' convictions under Section 844(h)(1), the court concluded that the language of the statute was "clear and unambiguous" and applied to petitioners' conduct:

> Section 844(h)(1) states in simple, clear terms that "[w]hoever . . . uses *fire* or an explosive *to commit any felony* which may be prosecuted in a court of the United States . . . shall . . . be sentenced to imprisonment for five years[.]" * * * The language of the statute does not limit itself to the prosecution of arson cases, as the defendants urge us to conclude. Had Congress wanted to so limit the statute, it could have easily inserted the word "arson" into the statute. *See Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993).

Pet. App. 7. Because the petitioners "used fire to burn two crosses in order to commit the felony of violating the civil rights of the inhabitants of the house," they were guilty of violating Section 844(h)(1). Pet. App. 7.

The court acknowledged that the Eighth Circuit had reached a contrary conclusion in *United States* v. *Lee*, 935 F.2d 952 (1991), petition for cert. pending, No. 93-1276. It stated, however, that "because the *Lee* court bypassed the clear and unambiguous language of section 844(h)(1), we reject its determination that section 844(h)(1) does not apply to cross burnings done to violate another's civil rights under 18 U.S.C. § 241." Pet. App. 12.

The court of appeals also rejected petitioners' First Amendment challenge to Section 3631. Pet. App. 13-19. A majority of the court found that while "the cross burnings here involved some degree of expres-

sive conduct," *id.* at 15 (citing *R.A.V.*, 112 S. Ct. at 2541 & n.1, 2544, 2550), the petitioners' conduct was not entitled to First Amendment protection. Pet. App. 16.

Relying on *Texas* v. *Johnson*, 491 U.S. 397, 403 (1989), and *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968), the majority first considered "whether the government's regulation of [petitioners'] conduct was related to the suppression of free expression." Pet. App. 16. It concluded (*ibid.*) that

> [t]he purpose of section 3631(b) is to protect the right of an individual to associate freely in his home with anyone, regardless of race. To achieve that end, the statute prohibits acts of willful intimidation against people based on race. The statute, then, is aimed at curtailing wrongful conduct in the form of threats or intimidation, and not toward curtailing any particular form of speech. See *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2200-2201 (1993).

The majority therefore applied the standard of review set forth in *O'Brien*, 391 U.S. at 377. Section 3631, it held, is "sufficiently justified" because it "furthers an important or substantial governmental interest; * * * the governmental interest is unrelated to the suppression of free expression; and * * * the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Pet. App. 17 (quoting *O'Brien*, 391 U.S. at 377). The Fair Housing Act, 42 U.S.C. 3601 *et seq.*, of which Section 3631 is a part, "was a proper exercise of the government's power under the Thirteenth Amendment." Pet. App. 17. Section 3631(b) itself "advances an important and

substantial governmental interest by protecting a person's right to occupy a dwelling without fearing threats or intimidation based on race." Pet. App. 17. And the statute is narrowly tailored because it does not prohibit cross-burning "as a form of expressive conduct" (*ibid.*); rather, in burning the crosses, the petitioners had "willfully inte ded to threaten and intimidate those in the Jones household for entertaining black people in their home." *Id.* at 18 (citing *United States* v. *Gilbert*, 813 F.2d 1523, 1529 (9th Cir.), cert. denied, 484 U.S. 860 (1987)). The expressive content of petitioners' act, the court held, was "swept up incidentally within the reach of a statute directed at conduct rather than speech." Pet. App. 18 (quoting *R.A.V.*, 112 S. Ct. at 2546-2547). Judge Flaum joined the court's analysis of Section 844(h)(1) but concurred separately with respect to the validity of Section 3631. Pet. App. 32-41.

DISCUSSION

Although the court of appeals correctly decided both questions presented by the petition in this case, we believe that review by this Court is appropriate. In 1993 alone, the United States brought to trial or accepted pleas in prosecutions involving ten separate cross-burning incidents, and the government continues to investigate new cross-burning incidents for possible future prosecution. Defendants in these cases are generally charged with violations of 18 U.S.C. 844(h)(1), 18 U.S.C. 241, and either 42 U.S.C. 3631 or 18 U.S.C. 245(b)(2), a similar statute applicable to interference with attendance at a public school or college, use of public facilities, employment, or other federally protected activities. The legal challenges pressed by petitioners here are invoked by

defendants in the large majority of these prosecutions. Thus, both questions presented by this petition are likely to arise frequently in the future.

There is a square conflict between the Seventh and Eighth Circuits as to the applicability of 18 U.S.C. 844(h)(1) to cross-burning prosecutions. While there is no circuit conflict on the second question presented, it is an issue of substantial importance to the enforcement of federal criminal civil rights laws. We believe that a definitive resolution by this Court would greatly assist the federal government's prosecution of civil rights offenses.

1. Section 844(h)(1), 18 U.S.C., provides that an individual who "uses fire * * * to commit any felony which may be prosecuted in a court of the United States" shall be subject to a mandatory additional sentence of five years' imprisonment. The Seventh Circuit's ruling that the statute applies in this case squarely conflicts with the decision of the Eighth Circuit in *United States* v. *Lee*, 935 F.2d 952 (1991).[3] Indeed, the court of appeals here acknowledged the conflict but concluded that the *Lee* court had "bypassed the clear and unambiguous language of section 844(h)(1)." Pet. App. 12.

In our view the Seventh Circuit's resolution of this issue is correct. In light of the square circuit conflict and the significance of the question presented, however, we believe that review by this Court is warranted.

2. Petitioners contend that Section 3631 is facially invalid because it prohibits only bias-motivated inter-

[3] On February 4, 1994, the United States filed a petition for a writ of certiorari in *Lee*, No. 93-1276, and asked the Court to hold that petition pending resolution of this case.

ference with housing rights and does not proscribe threats of force generally. Challenges of this nature have been made by defendants in nearly every federal cross-burning prosecution since this Court's decision in *R.A.V.* A definitive resolution of the issue by this Court is of substantial importance to the vigorous enforcement of federal civil rights laws. Despite the absence of a circuit conflict regarding the validity of Section 3631, we believe that the question is of sufficient importance to warrant this Court's review.[4]

Indeed, petitioners' contention that Section 3631 violates the First Amendment by proscribing some threats but not others would, if accepted, cast doubt upon a broad range of federal criminal statutes. See,

---

[4] The absence of a circuit conflict should not obscure the fact that *R.A.V.* has created substantial uncertainty regarding the appropriate legal analysis to be applied when government singles out for prohibition particular categories of unprotected speech or expressive conduct. In the present case, for example, although the court of appeals unanimously affirmed petitioners' convictions, the majority and the concurrence divided sharply in their reasoning. Compare Pet. App. 13-19 (42 U.S.C. 3631 is consistent with the First Amendment because it is directed at conduct, not expression) with Pet. App. 38 (Section 3631 is consistent with the First Amendment because it focuses not on the content of the threat "but rather on the choice of victim or on the motive of the person making the threat").

The application of First Amendment principles to federal cross-burning prosecutions has been a source of confusion in other respects as well. For example, in *United States* v. *Lee*, 6 F.3d 1297 (8th Cir. 1993) (en banc), petitions for cert. pending, Nos. 93-1276, 93-7412, both the plurality opinion and a separate opinion concurring in part and dissenting in part combined the standards to be applied in prosecutions for *advocating or inciting* violence with those to be applied in prosecutions for *threatening* violence. See 6 F.3d at 1302-1304; *id.* at 1307.

e.g., 18 U.S.C. 115 (threats to assault, kidnap, or murder a federal official or his family); 18 U.S.C. 241 (conspiracy to injure, oppress, threaten, or intimidate those exercising any right guaranteed by federal law); 18 U.S.C. 245 (use of force or threat of force against those who exercise enumerated federal rights); 18 U.S.C. 871 (threats against the President or successors to the presidency);[5] 18 U.S.C. 875(c) (interstate transmission of threats to kidnap or injure); 18 U.S.C. 876 (transmission by mail of threats to kidnap or injure); 18 U.S.C. 879 (threats against former Presidents); 18 U.S.C. 1513 (threats of injury to person or property of witnesses or informants). Nor could petitioners' contentions plausibly be limited to symbolic speech such as the cross burnings at issue here. Rather, under petitioners' interpretation of *R.A.V.*, Section 3631 could not constitutionally be applied to express verbal threats of violence intended to dissuade individuals from the exercise of their federal right to obtain housing on a nondiscriminatory basis. The broad implications of petitioners' argument underscore the significance of the question presented.

For more than a century, the burning cross has been used as a symbol of terror. It has been, as the court of appeals recognized, "a precursor to physical

[5] This Court noted in *R.A.V.* that "the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871—since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President." 112 S. Ct. at 2546.

violence and abuse against African-Americans and . . . an unmistakable symbol of hatred and violence based on virulent notions of racial supremacy." Pet. App. 15 (internal quotation marks omitted). In the last decade of the Twentieth Century, cross burnings are still occurring with alarming frequency. When a cross is burned with the intent to threaten and intimidate those who are exercising their federally guaranteed rights, the United States is determined to prosecute those responsible. This Court should make clear that its decision in *R.A.V.* does not cast doubt upon the propriety of these prosecutions.

CONCLUSION

The court should grant review of the questions as set forth in this brief.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

DAVID K. FLYNN
LINDA F. THOME
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MARCH 1994